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A CRITICAL NOTE ON LOWRY *V*. CONSOLIDATED AFRICAN SELECTION TRUST, LIMITED, (1940) A.C. 648.

BY

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To the earnest student of law, the decisions of the English Courts will always make an irresistible appeal. These decisions form a special class of literature, by themselves, unique in the felicity of language employed and in the luminous discussion of the numerous questions of fact, and, especially, of law that present themselves for decision. And there is nothing so stimulating to the intellect and affording such genuine pleasure as a study of the decisions of the Court of Appeal and of the House of Lords, especially when, as so often happens, divergences of opinions crop up among the members of these tribunals. The different angles from which human ingenuity can look at the same set of facts, the manner in which from first principles, the noble Lords develop their own particular theme, so as to solve the complicated questions that arise for decision, and the brilliant exposition of the "opinion" delivered by each of the Lords all these factors afford an amount of exercise to the intellect that cannot be had elsewhere.

Examples of such decisions are many. To mention a few, the cases of *Mahon* v. *Osborne*[1]—a decision of the Court of Appeal, where the doctrine of *res ipsa loquitur* is examined threadbare—of *Radcliffe* v. *Ribble Motors*[2] and *Wilsons* v. *Clyde Coal and Co.*,[3] (especially, the "opinion" of Lord Wright) where the doctrine of common employment receives a full examination, of *Fender* v. *St. John Mildmay*[4] —where there is a complete examination of the doctrine of public policy—may be mentioned as very recent examples.

1. (1939) 1 All.E.R. 535.
2. (1939) A.C. 215.
3. (1938) A.C. 57.
4. (1938) A.C. 1.

The case under notice must be classed as a leading example of the type of cases mentioned. The facts of this case are quite simple. The question to be decided was whether a Company could claim to deduct—for purposes of income-tax—the potential value of new shares issued as a bonus to its employees, at par, considerably below the market value of these shares then obtaining. No cash was paid by the Company; but, by the issue of these shares at par, the Company lost the chance of obtaining a premium of £11625/- which it could have got by issue in the open market, while undoubtedly, the employees derived a substantial benefit and were, also, charged to income-tax on the advantage which they thus derived. The question that fell to be decided was whether under these circumstances, the Company could claim to deduct the sum of £11625/- from the profits of their trade for the year of assessment.

The relevant Rules of the Income Tax Act were also, simple. Rule 1 of cases I and II of Schedule D provided—as expressed by Lord Wright at p. 683 of the Report—that the tax be charged without any deduction other than by the Act allowed. R. 3 (*a*) which is also relevant declared that "no sum shall be deducted in respect of any disbursements or expenses, *not being money wholly and exclusively laid out or expended for the purpose of the trade*......." The assessee claimed that he was entitled to claim this deduction under R. 3 (*a*) quoted above.

Stopping there, it would appear to an unsophisticated mind to be reasonably clear that the assessee's claim should fail. No "money" was, *de facto*, "laid out" or, "expended" within the meaning of the rule cited. At the highest, it could be said that there was only a notional "expenditure" of "money" for the purpose of the trade *i.e.*, to advance the interests of the company by creating in the employees a more direct interest in the trade as a result of their becoming share-holders, as well. There was no rule authorizing in terms a deduction under similar circumstances, as, for example, in the case of the "annual values" of buildings employed in the business of the trade—a matter covered by R. 3 (*c*). These being the facts, as stated the conclusion would appear to a fresh mind, to be clearly against the assessee's claim. No money having been actually "expended," and there being no rule authorising a deduction under such circumstances, the assessee's claim was really hopeless.

But, then, different opinions were expressed during the various stages of the case. Macnaghten, J. in the first instance, ruled against the opinion given by the Commissioners. The Court of Appeal, in an unanimous judgment delivered by the Master of the Rolls reversed

Macnaghten, J., and were, in turn, reversed by the House of Lords, but, only by a majority judgment (Lords Wright and Romer dissenting). The final decision was against the assessee. The most interesting feature of the case was that each one of the noble Lords expressed himself as quite clear in his judgment and felt constrained to deal with the case elaborately, only because a "divergence of opinion" had "emerged."

It is submitted that the majority opinion was the only possible answer to the question that was raised.

Two positions were conceded by the dissenting Lords and by the Court of Appeal :—

(i) Money foregone is not always money expended ; "there is no such general proposition"—per Greene, M.R., at pp. 357 and 362 of (1939) 1 All.E.R. 353; *see also* per Lord Wright at p. 689 of (1940) A.C. 6*r*8.

(ii) Premium earned by a company on issue of shares can never be taxable profits ; it can never be entered in the Profits account, but, will be assigned to the capital account ; per Lord Wright, at p. 679 and Lord Romer at p. 692, *ibid.*

Nevertheless, this sum of £ 11625/- which was never acquired or given as such, but, was only a notional sum, or, as Lord Wright preferred to put it, "potential" profit was considered to be deductible by the Court of Appeal and Lords Wright and Romer. The matter was, according to their Lordships, clearly governed by authority. According to Greene, M.R. and Lord Wright, the governing authorities were *Usher's* case[1], reaffirmed by *Hoare's* case[2]; and, conversely, the case of *Salmon* v. *Weight*[3]. Lord Romer was of the view that *Usher's* case[1] and *Russell's* case[4] ruled the instant case; the noble Lord did not, however, rely on *Weight's* case[3].

On the contrary, the majority opinions held that none of the cases had any application to the case before the House. The Lord Chancellor observed at p. 656 "with the greatest respect to the Court of Appeal, I am unable to find any principle laid down in *Usher's* case[1] which can be applied to the facts of the present case." Referring to the sentence relied on by the Court of Appeal and extracted from the speech of Lord Sumner, Viscount Maugham observed at p. 664 "with all respect to the memory of a great Judge, I cannot help thinking that the reference to "chattels" must be due to a slip and—I do not think that the sentence in its wide form can be supported." Referring to *Weight's* case,[3] the noble Lord observed "I can see no difficulty in that case ; but, I find some difficulty in appreciating its application to the one before us."

1. (1915) A.C. 433.
2. (1932) A.C. 407.
3. (1935) 153 L.T. 55.
4. (1858) 13 A.C. 418.

(p. 668). And Lord Russell of Killowen said at p. 675 "I am unable to see how the reasoning in either of these two decisions (1915) A.C. and 13 A.C. can be applied to a case like the present." Both Lord Russell and Viscount Maugham were of opinion that *Hilder* v. *Dexter*[1] was directly against the argument for the assessee, while Lord Wright observed at p. 688 that that case "either does not throw any light, or.... more accurately, supports my view."

These cases may, now, be briefly considered. *Usher's* case[2] and the case which it followed, *Russell's* case[3] were both cases where the assessee sought to claim a deduction, in the first case of the difference between the A. schedule assessment and the actual amounts realised from the "tied" tenants, and, in the second case, of the rental value of the premises allowed by the company to be occupied by the manager of the company. Now, the relevant rule, corresponding to the present R. 3 (*c*) specifically referred to the rental of buildings used for "purposes" of trade, and it was, only because of the existence of such enabling rules, that the House, applying the rule enunciated by Lord Herschell in *Gresham's* case,[4] allowed the deduction. But, *for the existence of R.* 3 (*c*), *it is clear that the deduction would not have been allowed*, see in this connection the observation of Lord Atkinson at p. 659 (1) 112 L.T. (*Usher's* case), "Deductions which on ordinary practice and business principles—might be deducted—are restricted." The noble Lord was referring to R. 1 of cases I and II of Schedule D. That being so, to say that *Usher's* case laid down any principle of general application, beyond the specific case that was before the House appears, with all respect, to be unjustifiable. On the contrary, except Lord Sumner whose observations from p. 460 of 1915 A.C. are relied upon, no other noble Lord professed to lay down any principles of general applicability. In fact, Lord Parker specifically refers to 13 Appeal Cases 418, and observes at p. 659 (1) of 112 L.T. that *Russell's* case[3] had decided that the annual value was deductible —in a binding fashion—"*although such annual value is not expended in the ordinary sense of the word.*" The whole idea of expenditure of a "notional sum" would, in fact, appear to be foreign to the scheme of the Act and would run counter to the expressed terms of R. 1 of cases I and II of Schedule D.

Hoare's case[5] does not, also, it would seem, advance the assessee's case any further. That case dealt with a different problem, the problem of "aggregation of values, and, in the course of the opinions expressed, the noble Lords sum up the conclusions come to in *Usher's* case. Indeed, as Lord Russell

1. (1902) A.C. 474.
2. (1915) A.C. 433.
3. (1888) 13 A.C. 418.
4. (1894) A.C. 309.
5. (1932) A.C. 407.

of Killowen observed, at p. 674 of (1940) A.C., the language employed by Lord Sumner, if " taken literally " would lead to " some startling results." It is enough to conclude this portion of the subject with the statement that the law does not countenance any notional "expenditure" except in the solitary case of the instances governed by R. 3 (*c*), *e.g.*, *Usher's* case and *Russell's* case. In every other case, there should be a *de facto* expenditure" and a mere negative foregoing of profit cannot attract R. 3 (*a*).

Salmon v. *Weight*[1] presents less difficulty. That case was as the majority Lords pointed out, a case under Schedule E which has nothing in common with Schedule D, which governed the case in question. It was, as Lord Wright pointed out, the converse of the instant case, " the counter-part " as the noble Lord put it at p. 686. It was no doubt held in *Weight's* case that the advantage which the assessee got by an allotment of shares at par, when these shares were selling at a premium in the market, was assessable ; but it must be borne in mind that the language of the rule in question was very wide, and comprehensive—" any perquisites or profits *whatsoever* therefrom"—and, as Lord Atkin who delivered the solitary opinion in that case, observed, there was " no clog on the (allottee) to go on the market and sell the shares." That case, however, can, with all respect, throw no light on the question raised in the instant case. For, the matter had been decided in *Hilder's* case[2] that the allotment of shares at par at a time when the shares are selling in the market at a premium does not involve the company in any " expense." Before passing to that case, it may be incidentally mentioned that *Weight's* case is in conflict with *Blott's* case[3].

Hilder's case, as stated, makes the matter plain. Though the case was decided on the terms of S. 8 of the Companies Act, yet, there is one observation by Lord Davey which was the basis of the decision in that case, and which is highly pertinent to the question arising in the case under notice. At p. 480, Lord Davey observed, " But the point which alone is material for the present purpose is that the benefit of the shareholder from being able to sell his shares at a premium *is not obtained by him at the expense of the Company's capital.*" Those words precisely apply to the present case. The company, by the issue of the 6,000 shares to its employees *did not incur any expense.* Lord Wright asks at p. 682 of (1940) A.C., "If the expense of letting houses ...... is deductible, I cannot see why in principle, the expense of allotting shares .... should not equally be deductible." With respect, the premises are not correct. Lord Wright had been answered long before by Lord Davey.

1. (1935) 153 L.T. 55. 2. (1902) A.C. 474.
3. (1921) 2 A.C. 171.

The conclusions can be summarised in a series of propositions :—

I. No sums can be deducted, for purposes of income-tax, unless they are in fact " expended " ; the only exception is that covered by the " annual rental value " cases.

II. No sum can be deducted, unless permitted by the rules ; *see* R. 1, cases I and II, Schedule D. The dictum of Lord Romer to the contrary occurring at p. 700 of (1940) A.C. would appear to be misleading ; the observation of Lord Atkinson at p. 659 (1) of 112 L.T., would appear to be more in harmony with R. 1.

III. The premium that a company obtains on issue of shares can never be a trading profit, and can never be taxable profit.

IV. The mere fact that the employees derive a certain advantage from the Company does not necessarily lead to the inference that the Company has incurred a deductible expense within the meaning of the Income-tax Act.

V. No expense whatever is incurred by a Company when it issues shares at par, even if, at that time, these shares sell at a premium in the open market.

VI. *Usher's* case cannot be treated as affirming any general proposition that if on ordinary commercial principles a certain outlay or notional expenditure is necessary and is incurred, it must, of necessity, be treated, for purposes of income-tax, as deductible. Lord Sumner's observations, especially, the reference to "chattels" must be treated as *obiter*. It may be useful here, to recall the salutary warning given by Lord Wright in *Radcliffe's* case[1] :—"It (the House) may—refuse to act on expressions of opinion or matters of observation in opinions of members of the House.

VII. The fact that the employee is assessed on shares allotted to him, on the basis of a notional advantage gained by him is irrelevant to the question whether the company should be allowed the deduction claimed.

SUMMARY OF ENGLISH CASES.

SCOTT *v.* FRANK F. SCOTT (LONDON), LTD., (1940) 1 Ch. 794.

Companies—Articles of association not in accordance with intention of signatories—Rectification—If can be made by Court.

The Court has no jurisdiction to rectify articles of association even although it should be proved that the articles of association do not accord with what is proved to have been the concurrent intention of the signatories at the moment of their signature.

(1940) 1 All.E.R. 392, affirmed.

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1. (1939) 1 All.E.R. 656 : (1939) A.C. 215.

KING FEATURES SYNDICATE, INC. v. O. &. M. KLEEMANN, LTD., (1940) 1 Ch. 806.

Copyright—Drawing in two dimensions—If can be infringed by toy figure in three dimensions—Reproduction from copy of plaintiff's work—If infringement of copyright in original work.

Where the artistic work in which copyright is claimed is a drawing in two dimensions (cartoons) it can be infringed by a figure in three dimensions (such as brooches or charms, plaster dolls and mechanical toys). It is immaterial whether the infringing article is derived directly or indirectly from the original work. The standard is objective and the test is whether or not the original work or a substantial part thereof has been reproduced. If it has been, it is no answer to say that it has been copied from a work which was itself, whether licensed or unlicensed, a copy of the original.

(1940) 2 All.E.R. 355, affirmed.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD. v. MIDLAND BANK, LTD., (1940) 2 K.B. 388.

Insurance—Indemnity in favour of three persons in respect of respective rights—Claim by one—Cheque in payment in name of all three indorsed by them to claimant—Subsequent claim for recovery of amount on the ground that claimant was not entitled to indemnity as property insured was wilfully set fire to by assured's servant—Payees of the cheque if liable.

An insurance policy indemnified three persons for their respective rights and interest. After a fire there was a claim by one of them and the insurers paid by cheque in the name of all three assured who indorsed the cheque to the claimant. The insurers, on discovering that the fire was wilfully caused by the claimants' servant (the claimant having become bankrupt) sued the other two payees of the cheque to recover the amount.

Held, the payees who having no claim whatsoever endorsed the cheque to the real claimant were not the recipients of the amount and were not liable for repayment of the money on the ground that it was paid under a mistake of fact.

IMPERIAL SMELTING CORPORATION, LTD. v. JOSEPH CONSTANTINE STEAMSHIP LINE, LTD., (1940) 2 K.B. 430.

Contract—Charterparty—Frustration by accident to ship—Onus of proving whether frustration was or was not self-induced.

The charterers claimed damages against shipowners for failure to load. The shipowners pleaded in defence the destruction of the ship as a navigable unit by reason of the bursting of the boiler and claimed that the contract was thereby frustrated without liability

on their part. The charterers contended that the frustration arose from the default of the shipowners who are not therefore entitled to rely upon it.

Held, a party *prima facie* guilty of a failure to perform his contract cannot escape under the plea of frustration unless he proves that the frustration occurred without his default. There is no frustration in the legal sense unless he proves authoritatively that the cause was not brought into operation by his default.

(1940) 2 All.E.R. 46, reversed.

HILLS *v.* CO-OPERATIVE WHOLESALE SOCIETY, (1940) 2 K.B. 435.

Master and servant—Recovery of damages under Employers Liability Act, 1880, for personal injuries caused by negligence in the course of common employment—Action at common law against employers for servant's negligence—Barred as there was only one cause of action which was satisfied in prior proceedings.

A servant injured by the negligence of his fellow servant having a cause of action against his employers had two courses open to him, namely, (*i*) to raise that cause of action in proceedings under Common Law in which the defence (common employment) would be available to the employers but he could claim unlimited damages ; or (*ii*) to raise that cause of action in proceedings under Employers Liability Act, 1880, in which the defence of common employment would be denied to the employers but the damages could not be recovered above a fixed maximum. Once the cause of action under Employers Liability Act, 1880, has been completely satisfied the employee cannot carry on the other set of proceedings under Common Law and endeavour to recover damages in respect of that cause of action which has already been satisfied.

(1940) 2 All.E.R. 441, affirmed.

O'GRADY *v.* M. SAPER, LTD., (1940) 2 K.B. 469.

Master and servant—Servant's rights to wages during absence due to illness.

The headnote of *Morrison* v. *Bell*, (1939) 2 K.B. 187=(1939) 1 All.E.R. 745, that incapacity to perform duties due to illness does not at common law suspend his right to wages under the contract is not and cannot be any statement of any principle of the common law. It is a pure question of fact in every case. If one is to ascertain the implied terms one has to ask oneself : " If somebody had raised the question when they were originally making the bargain what would they both have said about it" ? In the present case when the employee was ill on previous occasions he was not paid any wages.

This is conclusive proof that the agreement was that he should not be paid during illness and the employee is therefore not entitled to wages during illness.

HOUGH *v.* LONDON EXPRESS NEWSPAPER, LTD., (1940) 2 K.B. 507.

*Tort—Libel—*Innuendo*—Words defamatory in ordinary meaning but capable of being understood in a secondary and defamatory sense—Proof that some person understood them in the defamatory sense—Whether necessary.*

When circumstances are proved which will clothe with a defamatory meaning words otherwise innocent the question must be (as in the case of words *per se* defamatory) whether reasonable people who know the special circumstances might understand them in a defamatory sense. It is unnecessary though not inadmissible, to call persons to say that they did so understand the words, provided that it is proved that they are people who might so understand them. The plaintiff was the wife of F.H. a boxer and living apart from him and this fact was proved to be known to persons in the neighbourhood. The defendants published in their newspaper, "F.H.'s curly haired wife sees every fight ......" The plaintiffs hair was not curly. Plaintiff alleged an *innuendo* that the words meant that she was a dishonest woman falsely representing herself to be, and passing as the wife of F. H. and that she was an unmarried woman who had cohabited with and had children by F.H.

Held, the words were capable of the *innuendo* and defendants were liable for damages.

JOTTINGS AND CUTTINGS.

THE PORT TRUST MURDER CASE.

(*A sketch by the Hon'ble Mr. Justice Wadsworth, broadcast from the Madras Station of All India Radio.*)

Crier : Silence !

(*Outbreak of coughing on all sides.*)

(*Judge :* Mr. Crown Prosecutor, don't you think it would be a great help to the jury, if you were briefly to summarise the evidence of the witnesses examined last Thursday? After the intervening holidays, the gentlemen of the jury may have forgotten some of the details of the case and will be glad of your assistance in refreshing their memories.

Crown Prosecutor : I respectfully agree with your lordship and will adopt your lordship's suggestion. Gentlemen of the jury, I need not remind you that the accused Ponnusami stands charged with having murdered Kanniah, by taking him to the end of the eastern

arm of the Madras harbour and there pushing him into the sea. You will remember that the corpse of the victim has never been found and that no one actually saw the perpetration of the crime. The prosecution case rests on a chain of circumstantial evidence which, I submit, leads only to the conclusion that Ponnusami, from motives of jealousy, murdered Kanniah by drowning him in the Bay of Bengal. You remember the evidence of Kanniah's aged parents, that their son left home at 5-30 P.M. on the evening of the day before Sivaratri, in company with the accused, both having bicycles, and that he has not been seen or heard of since that night. They informed the police of his disappearance and the investigation led to the discovery of the two witnesses who have proved that Ponnusami and Kanniah rode on their bicycles at about 5-45 P.M. through the Port Trust premises towards the harbour arm. Kanniah was wearing a round imitation fur cap with the trade-mark "S.M." on the lining. They seem to have left their bicycles near the big crane which stands, as you all know, at the south-east corner of the harbour—at any rate, witness Ramudu noticed two bicycles leaning against the crane that evening and next morning the watchman Chengan found only one bicycle, which has been identified as the Rover machine belonging to Kanniah. Then we have the evidence of Ibrahim Sahib, who says that he had been fishing on the harbour arm and was packing up his tackle to go home, just at dark, when he heard a loud cry and a big splash coming from the direction of the northern end of the mole. Next we have the story of the constable that he saw a solitary man, whom he swears to have been the accused, ride his bicycle out through the main southern gateway of the Port Trust about half an hour after dark. The Sub-Inspector has proved that the accused absconded as soon as the investigation started. When he was recognised by witness Sundaram at Chingleput, the accused at first denied having been in Kanniah's company that night, but afterwards admitted that they had been together at the harbour, while declaring that they had separated on the Marina—which we know not to be true. Finally you will remember the two fishermen witnesses, who were fishing from a catamaran just outside the harbour on the morning of Sivaratri day, when they picked out of the water the cap with the trade-mark "S.M.", which has been identified as Kanniah's.

I think that is all I need say at present, my Lord.

Judge : Thank you Mr. Crown Prosecutor. An admirably concise summary, for which the jury will, I am sure, be most grateful.

What witness do we take next?

C. P. : I have only two more witnesses, my lord, whose evidence has a bearing on the motive for the crime. Call Sabapathi Naidu.

Crier : Sabapathi Naidu!

Voice outside : Sabapathi Naidu ! Sabapathi Naidu !

Pause—Whispering and coughing, then shout of " Silence."

Clerk : Sabapathi Naidu. Please repeat after me :

(*Both repeat the oath together.*)

C. P. : Mr. Sabapathi Naidu, I think you are a clerk employed by the Swadeshi Pills and Ointments Co., Madras.

S. N. : Yes, sir—I mean, yes, my lord.

C. P. : Do you know the accused Ponnusami and the missing man Kanniah ?

S. N. : Yes, sir—I mean, yes my lordship.

C. P. : Will you tell the jury what you know of the relations between these two men ? Were they friends or enemies ?

S. N. : They were great friends, your lordship—until there was that trouble about Lakshmi.

C. P. : Who is this Lakshmi and what do you know about her ?

S. N. : Lakshmi is a girl living in Devadasi Street and Ponnusami used to be very friendly with her.

C. P. : You say he *used* to be friendly with her. Are they no longer friends ?

S. N. : No, your honour—I mean, no your lordship. They quarrelled.

C. P. : How do you know they quarrelled ?

S. N. : Ponnusami told me that they quarrelled because of Kanniah.

C. P. : How was that ?

S. N. : Ponnusami said that he went to see Lakshmi one day and he found Kanniah's bicycle outside her house. He got angry and ran inside and Kanniah escaped by the back door. And when he questioned her Lakshmi abused Ponnusami with very bad words.

C. P. : Did he tell you what words she used ?

S. N. : Please, my lordship, they were very bad words. I would be ashamed to tell my lordship such bad language.

Judge : Come, come, Mr. Sabapathi Naidu ! This is not a girls' school. You need not be afraid to tell us what words were used. I am sure they won't be worse than others we have heard in this Court.

S. N. : Sir—I mean my lordship—Ponnusami told me that she called him a .... I am very sorry to speak such bad abuse to my lordship.

C. P. : Please, Mr. Sabapathi Naidu, forget your modesty and tell us what she called him.

S. N. : My lordship, she called him a ...... she called him a d. d. d. ......(*Shouts*)......a damned rascal !

Laughter—Cries of "Silence."

C. P. : She called him a damned rascal, did she ? And after that ?

S. N. : Ponnusami told me that he was much troubled and that he would see about that fellow Kanniah.

C. P. : (*Slowly and emphatically*)—He said he would see about that fellow Kanniah, did he ? When was all this ?

S. N. : That would be about one week before Sivaratri.

C. P. : Thank you, Mr. Sabapathi Naidu.

Defence Counsel : I have only one or two questions to ask you, Mr. Sabapathi Naidu. Were you present when this quarrel took place ?

S. N. : I, sir ? O no sir—I mean my lordship. I would never go to dancing girls' houses.

Def. C. : Of course not. And all you know about this quarrel is what you remember of what Ponnusami told you ?

S. N. : Yes, your honour.

Def. C. : You say that Ponnusami told you this about one week before Sivaratri. Are you sure it was not one month before ?

S. N. : O no, my lordship. I am sure it was one week before.

Def. C. : How can you be sure of the time ?

S. N. : Well, my lord, I remember that he told me this on the very day that the police caught me and sent me to jail.

Def. C. : No further questions, my lord.

C. P. : Why did the police send you to jail, Mr. Sabapathi ?

S. N. : Sir, I was very foolish and joined the anti-Hindi movement and they sent me to jail for one week—and gave me ragi food.

C. P. : Thank you Mr. Sabapathi. That will be all. I call Lakshmi Ammal.

Crier : Lakshmi Ammal !

(*Name shouted once or twice, in distance. Coughing and whispering. Then "Silence".*)

Clerk : Lakshmi Ammal. Please repeat the oath after me. (*Oath.*)

C. P. : Lakshmi Ammal, what are you ?

Lakshmi Ammal : I am a landlady, sir.

C. P. : A landlady! You mean that you take in lodgers?

L. A. : O no, sir. I would never do that. I mean that I live on the income from my land.

C. P. : I understand. You mean to say that you are a landed proprietor. Am I to take it that you have no other occupation or means of livelihood?

L. A. : O yes. I also earn money by singing and playing the vina. I have a very piercing voice and earn big fees by singing to Maharajahs and Ministers and High Court Judges.

(*Laughter*—"*Silence.*")

C. P. : Do you also perform for the amusement of smaller folk, such as this man Ponnusami, for instance?

L. A. : (*Coyly*) It is true that I have sometimes played the vina and sung to Ponnusami, when he came to see me.

C. P. : Did he come to see you often?

L. A. : Not very often. Perhaps once a week, but he hasn't been for a long time now.

C. P. : Do you know why he discontinued his visits?

L. A. : It was because I told him that I didn't want him to come any more.

C. P. : Was he pleased when you told him this?

L. A. : No, sir, he was very angry and he abused me with very bad words.

C. P. What were those words?

L. A. : O sir, I couldn't say such bad words to his lordship. It would not be proper.

Judge : Really, this solicitude for the innocence of the judiciary is being carried too far. Will you explain to the lady that I am not in the least likely to be shocked?

C. P. : Lakshmi Ammal, I must insist on your telling his lordship and the jury what bad language Ponnusami used.

L. A. : He called me a (*whispers*) damned rascal!

C. P. : A what? Speak up. I can't hear you.

L. A. : He called me a (*shouts*) damned rascal.

(*Laughter*—"*Silence.*")

C. P. : What a curious coincidence! And what did you say to him?

L. A. : I told him that if he could not behave like a gentleman in a lady's house, he had better go away.

C. P. : Of course. Can you tell us what was the cause of this, er, altercation ?

L. A. : How should I know ? Men are very strange and sometimes get angry about very little things.

C. P. : For instance ?

L. A. : Well, sometimes they are jealous and imagine that a lady is interested in some other man.

C. P. : Was that the trouble with Ponnusami ?

L. A. : I think so.

C. P. : Do you know whom he was jealous of ? I don't suggest that he had any reason to be jealous—but whom did he think you were interested in ?

L. A. : He was always talking about Kanniah and fancying that I had been having him to my house.

C. P. : Which, of course, was quite untrue ?

L. A. : Well.... perhaps not quite untrue, but nearly.

C. P. : What do you mean by nearly untrue ?

L. A. : I mean that Kanniah only used to come and see me on Tuesdays ; and as Ponnusami used to visit me on Fridays, he couldn't have seen me when he said he had.

C. P. : Quite so. I can understand your indignation at such an untrue allegation. That is all I have to ask you.

Def. C. : Lakshmi Ammal, *you* didn't call Ponnusami a damned rascal, did you ?

L. A. : O no, sir. I would never use such vulgar words. I have read up to the fourth form.

Def. C. : You merely told him firmly and politely that he must behave himself or go away ?

L. A. : Yes, sir. You see, I have to think of my reputation.

Def. C. : Quite. And I suppose your other gentlemen friends would not approve of any disorderly scenes in your house ?

L. A. : What do you mean by a disorderly house ?

Def. C. : I assure you that I meant nothing discreditable to you. I only suggest that your other gentlemen friends would not approve of Ponnusami making a row at your house.

L. A. : Of course they wouldn't.

Def. C. : You have a lot of gentlemen friends ?

L. A. : Just two or three.

Def. C. : I suppose Ponnusami knew that you had other gentlemen friends ?

L. A.: I don't think so. You see, I have found that my gentlemen friends are apt to quarrel with each other, so I try and keep them apart as much as possible.

Def. C.: And I gather that you don't always succeed. I suggest to you that Ponnusami was jealous of your other gentlemen friends, as well as of Kanniah?

L. A.: I don't think so. You see he .... he hadn't so much cause to be jealous of the others as he had of Kanniah.

Def. C.: Well you ought to know all about that.

C. P.: I close my case.

(*Pause—Coughing and whispering. Cry of "Silence."*)

Judge: Ponnusami, you have heard the prosecution case. Do you wish to make any statement regarding the evidence?

Accused: Yes, my lord and gentlemen of the jury; I wish to tell the whole truth about this case. I did not murder Kanniah. However black the case may look, I swear that I did him no harm. It is true that out of fear I ran away and hid and tried to escape arrest by telling lies. That was a very foolish thing to do and I regret it bitterly. I now realise that my only chance of convincing the jury of my innocence is to tell the whole truth, concealing nothing and admitting even those facts which seem to speak against me. I beg you, my lord and gentlemen of the jury, to give a sympathetic hearing to my story.

It is true that I quarrelled with Lakshmi Ammal and that I was jealous; but I was no more jealous of Kanniah than of half a dozen other men who used to visit her. I never quarrelled with Kanniah or wanted to do him harm. We were old friends and on the night before Sivaratri, we went on our bicycles to the harbour arm for a breath of fresh air, as we often did. We walked to the end of the mole and sat down near the lighthouse, watching the waves, till dusk. Then I suddenly remembered that I had promised to meet a friend at 7 o'clock.

Judge: Can you tell the jury who that friend was?

Accused: Yes, my lord. It was Jagannatha Mudaliar. But unfortunately I could not get him to speak on my behalf, as he left for Singapore next day and I don't know his address. Kanniah wanted to stay by the sea a little longer, so I said good night to him there and hurried back and rode off on my bicycle to meet Jagannathan. Two days later I heard a rumour that Kanniah had been murdered by being drowned in the sea and I was afraid that I might be implicated. So I ran away to Chingleput and hid there. When I was recognised and questioned, I was terrified and invented the foolish story that Kanniah and I had left the harbour together and parted

on the Marina. That was a silly lie and I am sorry for it. But it isn't right that I should be hanged for telling a lie. My lord, I swear that I did not kill Kanniah. I don't know even now whether he is alive or dead or what happened to him. This is the truth as................

(*He bursts into sobs. Whispering and talking*—" *Silence.*")

Judge: I can assure you, Ponnusami, that the gentlemen of the jury will give their most anxious consideration to your statement. Mr. Subramaniam, will you please open for the defence.

Def. C.: My lord, gentlemen of the jury: My client's frank and moving story, to which you have just been listening, relieves me of a large portion of my task. What he has told you, gentlemen, is a simple, unvarnished story of what actually happened. Not only is it true. I will demonstrate to you in a few minutes that I can prove its truth by positive evidence. My client did not kill Kanniah. It is all very well to prove that Ponnusami was jealous and that he was in company with Kanniah on the night when Kanniah lost his cap in the sea. Does that prove that Kanniah was drowned, or that Ponnusami pushed him in? I wonder how many hats are blown into the Madras harbour every year—probably dozens. But we don't charge the friends of all those who lost their hats with murder. How often does a big fish make a splash at dusk without some muddleheaded angler jumping to the conclusion that someone has fallen into the sea? You know Dr. Johnson's definition of angling—"a piece of string, with a worm at one end and a fool at the other." Again, how many bicycles are left leaning against a wall owing to the negligence or forgetfulness of the owner, or even with the deliberate intention of misleading. I ask you, gentlemen of the jury, as men of common sense and experience, are you prepared to send my client to the gallows on evidence such as this?

I say that the prosecution is bound to fail, however great the suspicion of foul play, unless it is proved beyond all reasonable doubt that Kanniah was murdered that night. The prosecution must prove not only that Kanniah lost his hat, but that he lost his life and that the accused caused his death. What is the point of all this suspicion and mystery, if Kanniah is still living? The prosecution says that he has disappeared. But how many men have disappeared without being dead? There are dozens of reasons which cause men to go into hiding—fear, love, debt, quarrels, a guilty conscience, a nagging wife, or a desire to give up the world and save one's own soul. Any one of these motives may have caused Kanniah to disappear. You cannot on the evidence infer that he is dead. But, gentlemen of the jury, even if you were inclined to do so, I am going to put it out of your power to make that terrible mistake. I will prove to you that Kanniah is alive.

Crier, call Kanniah.

(*Shouts of* "*Kanniah.*" *Buzz of conversation. Cries of* "*Silence.*")

Clerk : Kanniah, please repeat the oath after me. (*Oath.*)

Def. C. : Kanniah, when were you last in company with the accused Ponnusami?

Kanniah : On the night before Sivaratri.

Def. C. : Where did you go?

K. : We cycled to the harbour and walked to the end of the mole.

Def. C. : Did the accused push you into the sea?

K. : No, sir.

Def. C. : Am I wrong in assuming that you were not drowned that night?

(*Laughter—Cries of* "*Silence.*")

K. : I was not drowned, nor was I in danger of drowning.

Def. C. : Tell us what happened.

K. : Ponnusami and I sat talking at the end of the mole till it was nearly dusk. Then he suddenly remembered that he had an appointment and hurried off. I sat there thinking about my troubles and trying to pluck up courage to drown myself and put an end to my worries. You see, I was heavily indebted to the Mint Street sowcar, and though I had paid back twice as much as I had borrowed, he had got a decree against me for Rs. 500 and was trying to get me arrested and I didn't know what to do. I looked at the sea and tried to make up my mind to jump: but the waves looked so cold and dark and angry, that I could not do it. All of a sudden, I had an inspiration—I would pretend that I had committed suicide and disappear. It was quite easily done. I threw my cap into the water and left a pencilled message by the lighthouse. Unfortunately the wind must have blown the message away as it doesn't appear to have been found. Then I walked back leaving my bicycle where it stood, and took train for Ceylon, where I found work on a tea estate. A week ago a friend told me that the Madras Government had passed a new law that nobody need pay their debts to the sowcars. So I came back and fortunately arrived just in time to save my friend Ponnusami from the charge of murdering me.

Def. C. : Thank you, Kanniah. My Lord, I submit that on this evidence my client is entitled to an acquittal.

Judge : This is really a very unusual case and it certainly seems rather futile to go on with it when the victim has testified that he has never been murdered. Have you anything to say, Mr. Crown Prosecutor, before I direct the jury to return a verdict of not guilty.

C. P. : My lord, I crave your lordship's indulgence, but I have just received certain instructions which make it imperative that I should cross-examine this witness.

Judge : Well ! well ! We live in an age of miracles. First the murdered man testifies that he is still alive and now you want to cross-examine him—presumably to show that he is really dead. It seems rather futile, but I have no power to refuse your request. Proceed, but please be brief.

C. P. : Your lordship's wishes shall be respected. (*Coughs*) Kanniah—are you sure that your name is Kanniah ?

K. : Of course I am.

C. P. : My instructions are that your real name is Purushottam and that you have shaved your moustache and cropped your hair, so that you may bear some resemblance to Kanniah.

K. : I can't help your instructions. I am Kanniah, not Purushottam.

C. P. : Didn't you go to a barber in China Bazaar Road yesterday evening and have your moustache shaved ?

K. : Well, what if I did ?

C. P. : Why did you do that ? Was it because you knew that Kanniah was clean-shaven ?

K. No. I had a shave because I needed one.

C. P. : What was the trade-mark on the cap you threw into the harbour ?

K. : I .... I can't remember ...... I ......I think it was a ...... an elephant.

C. P. : Are you sure it hadn't the letters " P.K."

K. : Er......yes. It had an elephant and some letters like " P.K."

C. P. : And that bicycle which you left at the harbour—what make was it ?

K. : It was ...... I think it was a Zenith, but I can't remember.

C. P. : You are sure it wasn't a National ?

K. : I can't quite remember. It might have been a National.

C. P. : Had it got an oil lamp or an electric lamp ?

K. : I can't remember. Sometimes I used an oil lamp and sometimes a battery light.

C. P. : What was the name of the manager of the estate in Ceylon where you worked ?

K. : I ..... I don't know his name. We always called him the *dorai*.

C. P. : Now I want to ask you about Alamelammal, Kanniah's mother. What is the name of her elder brother ?

K. : I......I don't remember.

C. P. : Who is her younger sister ?

K. : I don't know all these things. I never paid any attention to my mother's relatives.

C. P. : Well ! well ! If you don't know about her relatives, we'll try something else. How many rooms are there in her house ?

K. : Er ...... four ...... or five.

C. P. : Or six ?

K. : There might be six.

C. P. : Where is the tap ?

K. : I ...... I ...... I can't remember.

C. P. : What is the door number ?

K. : I ...... I am getting confused with all these questions.

C. P. : Of course you are. And the reason for your confusion is that you are lying, when you say that you are Kanniah, son of Alamelu, isn't it ?

K. : I ...... I don't remember.

(*Laughter.—Cries of " Silence."*)

C. P. : My lord, I don't think I need ask this witness any further question. But I submit that in the interests of the administration of justice, his evidence requires further investigation.

Judge : I quite agree. Apparently a most impudent impersonator. The witness will be detained in the custody of a bailiff of this court, pending consideration of the question of prosecuting him for perjury.

(*Buzz of conversation. Cries of " Silence."*)

Def. C. : My lord, gentlemen of the jury : As your lordship has observed, this is a very extraordinary case. First we have a charge of murder without a corpse. Now I do not say that there must always be a corpse when there is a trial for murder, but my learned friend will concede that the production of the corpse for *post mortem* examination is the usual way of proving that the victim has been killed. In this case, all that we have to take the place of the corpse is a wet cap, an abandoned bicycle and the disappearance of their owner. These circumstances are suspicious, but they do not amount to proof of death, much less to proof of murder. Assume for a moment that Kanniah was drowned, how do we know that he did not commit suicide ? I suggest that there is no proof whatever that a murder has been committed. Now I must say just a few words about this last witness. I assure you, gentlemen of the jury,

that when I put him into the box I had every reason to think that he was the missing man, Kanniah. After my friend's cross-examination, I must confess to some doubt on this point. But even if we assume that there has been an attempt at personation, does that prove that Kanniah is dead? Gentlemen, when the chief examination of this witness was concluded, were you not all convinced—as I myself was convinced and as his lordship was apparently convinced—that the missing man stood before you. Well, what does that show? The very readiness with which we all accepted this story shows that the chain of circumstances on which the prosecution relies, was not complete. There is nothing impossible in Kanniah being alive to-day: and I solemnly warn you, gentlemen, of the danger that, in your indignation at an apparent attempt to deceive you, you may commit the terrible mistake of convicting my client of a murder which quite possibly has never been committed. Only consider the evidence, calmly and dispassionately, and you are bound to find my client not guilty.

C. P.: My lord, gentlemen of the jury, I have little to add to my opening remarks. But I must say a few words about this last witness, whose impudent attempt at impersonating a dead man has been so fortunately defeated. I entirely accept my learned friend's assurance that he was innocent of this astounding plot. But the very fact that the friends of the accused have thought it necessary to play such a trick, not only upon the Court and the jury, but also upon their own counsel, shows the depth of their conviction that only by trickery could the accused hope to escape the consequences of his own misdeeds. It is your duty, gentlemen, to show by your verdict your disapproval of such nefarious schemes. I submit that the evidence proves that Kanniah went on to the mole that evening in company with the accused, who had a motive to wish him ill; and that Kanniah was drowned in the sea that night in circumstances that justify the conclusion that this accused Ponnusami pushed him in. If you believe the evidence which I have adduced, the truth of which has not been seriously challenged, by the defence, you will, I submit, be justified in bringing in a verdict of guilty. If you are doubtful of his guilt, he is entitled to the benefit of the doubt, always provided that your doubt is a reasonable doubt and not a mere reluctance to accept the logical consequences of the evidence.

Judge: Gentlemen of the jury, there are two questions which you have to ask yourselves. Firstly, is Kanniah dead? Secondly, was he murdered by the accused? On the first point there are the facts that he went on to the harbour arm on the evening of the supposed crime, that his companion came away without him, that his cap was found floating in the water and his bicycle abandoned on the quay, that a shout and a splash were heard from the end of the

mole at nightfall and that Kanniah has completely disappeared since that night. Are these facts sufficient to establish death? You must remember that no corpse has been recovered, that the evidence regarding the shout and the splash is that of a single witness who may have been mistaken about what he heard or when he heard it. The finding of the cap and the bicycle would doubtless be enough to raise suspicion and justify enquiry, but does this evidence go any further?

Assuming that Kanniah is dead, has it been proved that the accused murdered him? Except for his own suspicious acts, there is very little to fasten the crime of murder upon the accused. The evidence of motive is not particularly strong and you must remember that while motive frequently indicates who might have committed a crime, it is hardly ever sufficient to prove that the suspected person actually did it. The conduct of the accused in absconding and, when recognised, in giving a false account of his movements is also highly suspicious. But remember that such conduct is consistent not only with guilt, but also with fear. Finally, can you rule out the possibility of suicide? I doubt very much whether you can.

Just one word about the witness who personated the missing man. His conduct will be considered in other proceedings. You are not concerned with it when once you have rejected his evidence, as I think you will. Neither the accused nor, I am sure, his counsel is responsible for this witness's prevarications. But when you remember how almost all of us were at first convinced that he was the missing man Kanniah, is it possible for us now to be equally certain that Kanniah is dead and that he was murdered by this man Ponnusami? Gentlemen, please consider your verdict.

(*A short pause, filled with whispering and coughing and shuffling of chairs. Then shouts of "Silence."*)

Clerk: Have you considered your verdict?

Foreman: Yes, my lord.

Clerk: Is it unanimous?

Foreman: Yes, my lord.

Clerk: Do you find the accused guilty or not guilty?

Foreman: Not guilty, my lord.

(*A sudden buzz of conversation. Shout of "Silence."*)

Judge: Ponnusami, you have been found not guilty by the jury and I acquit you of the charge of murder and direct that you be set at liberty.

Crier: Oyez, oyez, oyez; all persons having had business with my Lord the King's Justice in this Sessions of Oyer and Terminer, General Gaol Delivery and Admiralty in the City of Madras will

now depart, the Sessions having terminated. God save the King, Emperor of India and my Lord the King's Justice.

The Way in U. S. A.—As one might expect, America has produced the most hopeful plea lately put forward from the dock. A man charged at Glendale with burglary said : "I 'm doing it to pay my way through the Los Angeles City College." Less ambitious but likewise optimistic was the tramp at Nebraska who told Judge Palmer that his name was "Suspended Sentence Stevens." But the judge replied : "Well, they call me 'Ten-day Palmer.'" Too much self-confidence does not always pay in the courts of the United States. I like the story of the man who, on being fined 200 dollars, smiled and said : "That's O.K., judge, I got that in my pants pocket," to which the judge replied: "Then I will add one year's imprisonment. Got that in your pants pocket?" Then there was the Chicago judge who warned a young woman : "Be careful. You'll talk yourself into jail." She answered : "If I do that I can talk myself right out again." He immediately sentenced her, adding : "You can start preparing that speech right now."—*S.J., 1940, p. 487.*

Migration in the Profession.—In this country we have long been accustomed to the two branches of the profession of the law, the one consisting of members of the Bar, and the other that of the solicitors, the latter sometimes popularly, but by no means accurately, described as "the lower branch," though it was indeed done by Mr. E.B.V. Christian in his delightful book "Leaves of the Lower Branch," * * * * * * Quite separate as the two branches are, migration has frequently taken place between the two, for the most part from the solicitor branch to the Bar, but occasionally the migration has been the other way. Of immediate interest is it to note the large number of those who were destined to rise to high places in the law who started off in their legal career in what were called the offices of the attorneys, a term which has almost become obsolete save, curiously enough as part of the title of the head of the Bar. To mention a few of those who later achieved distinction at the Bar after having spent some probationary time in the offices of solicitors may prove of interest. Those who recall the career of Cowper the poet may remember that as a young man he was very frequently at the house of his uncle Ashley Cowper, Clerk of the Parliaments, who, it seems, was a very little man accustomed to wear a white hat lined with yellow, a circumstance which led his nephew to remark facetiously that it would not be very surprising if, some day, he should be "picked" by mistake for a mushroom and popped into a basket. More germane, however, to our present purpose is the

fact that Cowper was for a time a clerk in the office of a Mr. Chapman, a solicitor, where he had as a fellow clerk one Edward Thurlow, whose great powers Cowper even at this early date could appreciate, leading him one day to say, " Thurlow, I am nobody, and shall always be nobody, and you will be Lord Chancellor. You shall provide for me when you are." Thurlow smiled and said, " I surely will." " These ladies," said Cowper, " are witnesses." Let them be," replied Thurlow, " for I certainly will." One who traced Cowper's career in a charming memoir thus commented " Cowper's prophecy was fulfilled, but not Thurlow's promise." It may be added, however, that time, which weighs characters in unbiased scales, has given the recluse poet a higher status than was achieved even by the vigorous holder of the seals.—*L.T., 1940, p. 105.*

Lord Hardwicke.—Like most of those who rose to prominence in the law about the same time, Philip Yorke, whom we recall as the great Lord Hardwicke, spent his early years in the office of a Mr. Salkeld in Brooke Street, Holborn, being taken as an articled clerk without a fee. We are told that he gained the entire goodwill of his master who, in fact, early observed his abilities, but it appears that Mrs. Salkeld was not greatly appreciated by the future Lord Chancellor especially when she sent him to fetch in little necessaries from Covent Garden. In his accounts with his master we are told that entries frequently occurred such as these : " coach hire for roots of celery and turnips from Covent Garden, and a barrel of oysters from the fishmonger's." On observing this entry Mr. Salkeld deprecated "the impropriety and ill-housewifery of such a practice," and so put an end to it. About the same time that Yorke was being initiated into the mysteries of legal nomenclature and legal practice in the office of Mr. Salkeld the same gentleman was fortunate in having quite a number of young men bent on the same errand, these including Parker, afterwards Chief Baron of the Exchequer, Jocelyn later Lord Chancellor of Ireland, and John Strange, who in due time became Master of the Rolls—a galaxy of legal talent of which Mr. Salkeld no doubt was very proud.—*L.T., 1940, p. 105.*

Other Instances.—Among others who may be said to have graduated in law in the offices of attorneys, as they were then called, was Lloyd Kenyon who in due course became Attorney-General and Master of the Rolls. He was articled to a Mr. Tomkinson, an attorney at Nantwich, where we are told he with extraordinary diligence mastered the elements of the profession. He had apparently looked forward to a partnership with his master, but certain differences arose as to the terms and he forsook the ranks of intending solicitors

and changed over to the Bar to which he was called at the Middle Temple in 1756. The small allowance which his father was able to give him obliged him to a severe parsimony, a characteristic which he retained to the end of his days, and we are told that he was proud in his later years to point out the eating-house near Chancery Lane in which he, Dunning and Horne Tooke were accustomed to dine together at the modest cost of 7¼*d.* a head. In 1784 he was appointed Master of the Rolls, a post which then and till a comparatively late date did not preclude the holder from sitting in the House of Commons, and so we find that Kenyon was elected for Tregony "and fully ingratiated himself with the Minister by his zealous opposition to Mr. Fox as a candidate for Westminster, actually having a bed put up in the loft of his stables to give him a vote." After presiding at the Rolls for a few years he was, on the resignation of Lord Mansfield, appointed as head of the King's Bench. Lord Gifford who became Master of the Rolls had been articled to a solicitor in Exeter where he is said to have made himself so practically useful that during the illness of his employer he was entrusted with the management of the business. Changing over to the Bar, after a nine years' interval, he was appointed Solicitor-General; and a few years later he became Attorney-General in which capacity it fell to him to prosecute the conspirators implicated in the Cato Street plot for upsetting the Government. It fell to him also to open the charges against Queen Caroline in support of the preamble of the Bill of Pains and Penalties. Eventually, it will be recalled, he was appointed Chief Justice of the Court of Common Pleas. After his elevation to the peerage he took a leading share of the appellate work of the House of Lords, his work in the sphere giving great satisfaction to the legal profession in Scotland, an esteem which was markedly shown on a visit he paid to the north shortly afterwards. A curious reference to him will be found in Sir Walter Scott's Journal under date 9th June, 1826, which reads as follows: "One effect of running causes fast through the Courts below is, that they go by scores to appeal, and Lord Gifford has hitherto decided them with such judgment, and so much rapidity, as to give great satisfaction. The consequence will in time be, that the Scottish Supreme Court will be in effect situated in London. The downfall—as national objects of respect and veneration, the Scottish Bench the Scottish Bar, the Scottish law herself, and—and—there's an end of an auld sang. Were I as I have been I would fight knee deep in blood ere it came to that."—*L.T., 1940, p. 106.*

Unexplained Detention.—In 1690 one John Bernardi was arrested for political reasons which seemed good to the authorities and lodged in Newgate "loaded with heavy irons and put into a dark and stinking apartment." When he was brought to court to be bailed out the

Treasury Solicitor opposed his release and "whispered the judges on the Bench." On the pretext that further evidence against him must be collected a special Act of Parliament was passed to keep him in detention for another year. No charge was ever made against him, but successive Acts of Parliament were resorted to in order to keep him a prisoner. At the age of sixty-eight he married a devoted wife who bore him ten children within the walls of Newgate. He died still untried in 1736 after nearly fifty years in prison. And the moral of that is that when freedom from arbitrary arrest is at stake the courts and the people cannot be overjealous of resort to statute to exclude the traditional right of resort to the Judges of England. We see to-day a multiplication of cases in which persons, some obscure, some well-known, are indefinitely detained in prison, uncharged and untried. No doubt where admitted Fascists or Communists or enemy aliens are concerned the maxim *res ipsa loquitur* properly applies, but now that we have accustomed ourselves to the rhythm of war it seems only prudent in the case of the others to lay down some procedure (which could easily be devised) where by the actual grounds of suspicion or worse could be submitted by proper evidence to the trained, impartial and discreet consideration of the judges in court, if possible, or in chambers, if public safety demanded it.—*S.J., 1940, p. 512.*

Facts wanted.—The infallibility of police officials and Government departments and the unimpeachable reliability of anonymous informers was never a principle of the common law. No case added more lustre to the reputation of Lord Carson than his fight through official obstructionism to secure the vindication of young Archer Shee arbitrarily dismissed from Osborne for a theft he had not committed. To Ridley, J., he said : "The Crown can, I suppose, be high-handed out of court, but in open court it is not to be tolerated." Afterwards, recalling the scene in the Court of Appeal, he said : "I shall never forget how old Vaughan Williams who was a great lover of justice responded to my argument. 'Yes, yes, he said, 'Where are the facts? We want the facts.'—*S.J., 1940, p. 512.*

Campbell's Appreciation.—As all readers of Campbell's Lives of the Chancellors and the Chief Justices are well aware, the author is, in many instances, a severe critic, but it is noticeable that when speaking of Abbott, or Lord Tenterden as he became, his language is that of eulogy. He wrote, "I practised under him until his death, having daily fresh reason to admire his profound knowledge of his profession, his extraordinary soundness of intellect, and his invariable

and earnest love of justice." While he did not sentillate on the bench he was not without a fair share of humour, for we are told that the last day he ever sat in court, wishing to rebuke a counsel who was wasting time by very irrelevant questions respecting a journey performed by the Mayor of Bristol in a postchaise and four, the Chief observed with much solemnity, "Sir, you have forgotten to ask him the colour of the jackets of the postillions." The same night he was taken dangerously ill, and having in his delirium still dreamt of the trial in which he had been engaged, he expired with these words upon his lips: "Gentlemen of the jury, you will now consider your verdict." So passed away he who experienced in his youth the failure that was to prove the first step towards the success which he worthily reaped by his diligence and attention to work. It may be added that, following the practice of his predecessors in the office of Chief Justice, he never entered the House of Lords without wearing his judicial robes, and it was said that he was the last holder of the office to conform to the ancient rule.—*L.T.*, *1940*, *p. 120.*

Lord Braxfield.—Of this redoubtable judge, to whom, it is interesting to recall, young Walter Scott dedicated the thesis he prepared for admission to the Bar, Cockburn gives us a powerful sketch, describing him as "the giant of the bench," one whose very name made people start. His language was strong and abusive, this being so even in his own household as, for example, when his butler came to him to tender his resignation and on being asked why he was taking this step, replied that his Lordship's wife was always scolding him, an explanation which the judge met with the curt comment, "Ye've little to complain o'; ye may be thankful ye're no married to her!" They were very plain spoken in those days; indeed brutal. Thus, we read that Braxfield once said to an eloquent culprit whom he was about to sentence, "Ye're a very clever chield, but ye wad be nane the waur o' a hanging." "Hang," however, was, it seems, Braxfield's phrase for all kinds of punishment, as was the case when he said to Mr. Horner, the father of the once famous Francis, on entering the jury box at a sedition trial, "Come awa, Maister Horner, come awa and help us to hang ane o' thae damned scoondrels." In the like brutal fashion his colleague, Lord Kames, when he tried Mathew Hay, a man with whom he used to play chess, for murder, remarked when the jury returned their verdict of guilty, "That's checkmate for you, Matthew!".— *L.T.*, *1940*, *p. 131.*

Lord Cockburn's Story.—In his circuit journeys, Lord Cockburn has an amusing account of a medical man giving evidence in his very learned fashion and pooh-poohing various symptoms that spoke eloquently of the real facts. A woman was being tried for the murder of her child whose throat was found crammed with pieces of coal, while there were also marks of a thumb and two fingers on the neck. These cogent pieces of evidence had little or no influence on the medical expert who was called for the defence, who, whenever any of the murderous pieces of evidence were put to him, put them aside as of no account. He added that though such things might startle the ignorant they were of no consequence to a person of large practice and that he himself had seen hundreds of children born with very similar marks. "Ay, but Doctor, " interposed one of the jury of a severely practical turn, " did you ever see ony o' them born wi' coals i' their mooth ?"—*L.T., 1940, p. 168.*

Where the Doctor Scored.—So many stories have been retailed at the expense of the faculty that it is only fair that there should be recalled one in which the medical witness had the better of his cross-examiner. The witness was that very distinguished man, Dr. Gregory, who was called to give his opinion as to the mental capacity of the person in question. In the witness's opinion the particular person was insane. In cross-examination the Doctor admitted that the person played admirably at whist. Thereupon cross-examining counsel put to the witness the following question : " And do you say, Doctor, that a person having a superior capacity for a game so difficult, and which requires in a pre-eminent degree memory, judgment and combination can be at the same time deranged in his understanding ?" " I am no card player," replied the witness, " but I have read in history that cards were invented for the amusement of an insane King." This answer was conclusive. It may be added that according to a legend, whether well, or ill-founded is immaterial, cards are said to have been devised for the amusement of the mad King Charles VII of France.—*L.T., 1940, p. 168.*

BOOK REVIEWS.

THE NEGOTIABLE INSTRUMENTS ACT : By James Menezes, B.SC., LL. M., Advocate, Bombay. Published by Vora & Co., Publishers Ltd., Bombay, 1940. Price Rs. 3 nett.

The book is one designed specially for law students. As lecturer in Mercantile Law at the Sydenham College of Commerce and Economics, Bombay, the author has first hand knowledge of the

difficulties experienced by students of this branch of law. The author has therefore endeavoured to expressly lucidly and in simple language within a small compass the principles of the law relating to Negotiable Instruments in India. The citation of authorities has been selective both with reference to English as well as Indian decisions though we should have liked that cases like *Karam Chand* v. *Mian Mir Ahmad Aziz Ahmad*, A.I.R. 1938 P.C. 121 (as to the requirements of a promissory note) and *Ghanshyam Das Marwari* v. *Ragho Sahu*, I.L.R. 16 Pat. 84 (F.B.) (on the scope of S. 48) had also been included. The notes to the sections are clear and the illustrations useful. The book is bound to be of much help to lawyers and law students.

THE CODE OF CRIMINAL PROCEDURE: By V. V. Chitaley and K. N. Annaji Rao, published by the All India Reporter Ltd., Nagpur, 1940. Second edition. Vol. 1.

The authors are very familiar to the legal public in connection with their valuable commentaries on the Code of Civil Procedure and on the Indian Limitation Act. The book under review deals with the first 200 sections of the Criminal Procedure Code. The vast mass of decisions under each section has been analysed and classified under appropriate and relevant headings, the principles thereof have been elucidated and wherever conflicts of judicial opinion are to be found they have come in for adequate notice. The authors have borne in mind the principle that a legal publication, if it is to be really useful to the legal profession must be always kept up to date. One feature which would in some measure detract from the utility and popularity of the work is the mode in which references to decisions have been given. The references to Official Reports have no doubt been given where the authorities are to be found in the Official Reports but in other cases the references are almost from the A.I.R. and the Criminal Law Journal only. The book under review is essentially a case book and not a juristic treatise and as such there can be no real justification for the restriction practised in the matter of providing parallel references. The book is otherwise thorough and we have great pleasure in welcoming the publication.

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CASE FOR A VALIDATION ACT REGARDING THE RULE PROVIDING FOR APPEALS UNDER MADRAS ACT IV OF 1938.

It is one of the obvious duties of the Government to set at rest all doubts relating to the competency of rules and regulations intended to direct and regulate proceedings in Courts. This duty, (the Government is bound to recognise), is imperative in the larger interests of administration of justice and in such cases a Government worthy of its responsibilities ought to be alert and quick in motion. Such a situation has arisen at present in this Presidency consequent on the ruling given by the Full Bench of the Madras High Court in *Nagappa* v. *Annapoorani*[1].

The opinion of the Full Bench as expressed appears to travel a wider ground than what the facts of the particular case would warrant. On the facts of the case that led to the Full Bench reference, an application under the Agriculturists' Relief Act was provided by section 19 of the Act, and the competency of the Provincial Government to provide for an appeal against an order passed under section 19 by the original Court to which the application lay came up for consideration. The Full Bench held that the rule-making power under S. 28 of the Agriculturists' Relief Act could not and did not extend to providing an appeal and an appellate forum on orders which under the statute would be final without any further right of appeal.

The question would arise whether the Full Bench decision would at all apply to a case where the original application to the Court itself was left to be provided for by the rule-making power and the Provincial Government in the exercise of their rule-making power provided for applications before original courts subject to orders thereon being appealable under the very same rules.

1. (1941) 1 M.L.J. 164 (F.B.).

Prima facie where a statute provides for an application and a judgment thereon by an original Court, no appeal would lie from it to an appellate forum except in the only case of a similar statutory provision providing for an appeal and constituting an appellate forum. This rule is obviously subject to a further limitation that where by a pleading, whether called an application or a suit, a dispute is brought for adjudication before the ordinary Courts, in the absence of any special provisions to the contrary, the procedure of the court will govern the hearing of the dispute and the decision arrived at therein will, in matters relating to appeal, be subject to the very same provisions that govern its other decisions. *National Telephone Co. Ltd.*, v. *Postmaster-General*[1].

While the rule-making power under the Agriculturists' Relief Act, may or may not include a power to provide for appeals against orders on applications provided by the Act and in respect of which the Act is silent, it will not follow that where the Act has not provided for an application, the statutory power of making rules for the proper working of the Act must necessarily be limited to providing for an application to an original court and that no further provision could be made for appeals in respect of orders on that application.

Under the new Constitution Act, apart from the subjects exclusively reserved for the Federal Legislature, the Provincial Legislative authority is plenary and absolute. The Madras Agriculturists' Relief Act has left it to the Provincial Government to make rules for the proper working of the Act and the rules framed by the Provincial Government by virtue of this power would be quite as valid as the original legislation itself. The legislature is competent to frame the rule and if the legislature asked the Provincial Government to frame the rules and those rules were reported to the legislature sitting in its session and were accepted by it expressly or impliedly the objection that the rule was *ultra vires* would lose most of its force, if not entirely. A rule like the one in question would be vitiated if at all only by an irregularity in procedure, *vide Attorney-General* v. *Sillem.*[2] The Government of India Act, S. 87 cures all irregularities of procedure.

Any way the doubts and implications created by the Full Bench pronouncement must be set at rest by an early retrospective Validation Act as considerable unsettlement of rights has ensued and is bound to ensue. It must be remembered that the Act itself unsettled the condition of things existing before and was designed to afford remedial relief to agriculturist debtors. Where part of the machinery provided for working the Act has been pronounced to be incompetent and *ultra vires* it is the immediate and imperative duty of the Govern-

1. (1913) A.C. 546. 2. 10 H.L.C. 704=11 E.R. 1200.

ment to take the situation on hand and secure for the provisions that have been acted on all over the Presidency that authority, without which a good part of the activities of courts, public officers and of private parties for the best part of two years would prove to be an absolute waste.

The case for immediate remedial legislation is rendered the more strong and the more uncontestable when it is remembered that the point of decision by the Full Bench was one on which there was a difference of opinion between two division Benches of the High Court. One judgment was given on 21-7-1939, another on 20-9-1939, and on 28—10—1939, the rule in question was framed to resolve the difficulty in working the Act consequent on the divergence of judicial opinion as to the nature of the judicial proceeding intended by the Act.

Nor is it intrinsically very clear, why if an application is provided for by the statute, the rule-making power should not prescribe the form of the application and the nature of the jurisdiction invoked by the application and the nature of the order which may be passed on that application necessarily affecting its appealability and nature, matters in respect of which the statute is silent. There could be no question that the rule-making power could be invoked to solve difficulties in the working of the Act and if on a matter arising under the Act two Judges took one view as to the form and nature of an application and two other Judges took another view, the situation did certainly involve a difficulty in the working of the Act which the Provincial Government is expressly authorised to resolve by its rule-making power, S. 28 (2) (*c*).

These considerations are not adverted to in the judgment of the Full Bench. A comprehensive Validation Act retrospective in its operation is called for and it is hoped that the Provincial Government would not delay taking action.

[*Contributed*]

SUBSOIL RIGHTS

RIGHTS TO MINES, MINERALS AND QUARRIES IN PERMANENTLY SETTLED ESTATES

BY

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Land-revenue is the mainstay of Indian finance. Various theories have been advanced by the Hindu jurists of old about the relative position of the king and the tiller of the soil in connection with the determination of the nature and extent of the King's grain share.

It is not a fact that mines were unknown to the early Hindu jurists and administrators. The Arthasastra of Kautilya refers to the use of mines for state purposes. A reward as heavy as one-sixth was to be awarded to the person communicating the discovery of mines (Arthasastra IV, 1). In ancient times there was a two-fold division of the royal revenue: "The revenue derived from land" and "other kinds of revenue." Income from mines was recognised as a distinct source of royal revenue apart from land revenue and associated charges upon land and belonging to the category of "other kinds of revenue." Kautilya mentions twelve specified classes of mines consisting of (1) Gold, (2) Silver, (3) Diamonds, (4) Precious stones, (5) Pearls, (6) Corals, (7) Conches, (8) Base-metals, (9) Salt, (10), (11) and (12) minerals derived from the earth, stones, and fluids.[1]

Mines were regarded as State monopoly, and while the policy of the Arthasastra tended to confine state management only to those mines that were easy to work the views of other authorities show a marked divergence with regard to the revenue from mines. Thus Vishnu (III, 55) expressly declares that the King should appropriate the whole output of mines, whereas Manu (VII, 62) while mentioning mines as a source of revenue for which trusted officials are to be employed by the kings, directs (VIII, 39) that the king should take only one-half of the minerals. "Evidently the mines were contemplated as worked by private agency," concludes Dr. U. N. Ghosal, "subject to the payment of a tax to the King."[2] The Sukraniti (IV, 2, 118-119) contemplates the imposition of a tax upon mines. This is fixed curiously enough on a graded scale, *viz.*, 1/2 of gold, 1/3 of silver, 1/4 of copper, 1/6 of base metals, tin as well as lead, 1/2 of precious metals and 1/2 of salt after deducting in each case the expenses of production. Dr. Ghosal also refers to some copper-plate grants of A.D. 900, 1010-1050 and 1060 and concludes that the income from mines formed a branch of royal revenue in Assam.[3]

Manu (VIII, 39) says, "Of old hoards and precious minerals in the earth the king is entitled to half by reason of his general protection and because he is the lord paramount of the soil." This grouping of minerals with old hoards is very significant as it shows that minerals were not treated as arising out of the ordinary use of land and a special share apart from the share to be paid by the

1. Contributions to the History of the Hindu Revenue System by Dr. U. N. Ghosal Ph.D., 1929, Ch. V.

2. *Ibid.*, p. 111.

3. *Ibid.*, pp. 247-248.

possessor of land for the purposes of cultivation etc., is reserved for the king.

It may be suggested that the rights of "*Swatva*" (property or proprietary right) and "*Swamya*" (ownership) in land include the right of ownership in the things lying beneath the surface of the soil. It has been suggested that in treatises on Hindu Law (*e.g.*, Vyavahara Chandrika, Book I, Section 1, Cl. 51 and 4; Smriti Chandrika 1, Cl. 25) the rights of "*Swatva*" and "*Swamya*" are described "only in relation to the other rights acquired by the individual owners as against each other," but have no direct bearing upon the prerogative of the Crown as Paramount Lord of the soil[1].

Right to the soil, in an essentially agricultural economy, means the right for the purposes of cultivation of the soil and beyond this, scarcely, if ever, men's attention is drawn while adjusting their rights and obligations to each other and to the State. Moreover the discovery of mines, etc., is quite an accidental phenomenon and one can hardly expect any systematic development of legal conceptions regarding them unless such accidents happen in so large a number and within a certain range of time and space to attract the attention of jurists. Hence it will appear that in the Hindu Revenue system minerals were not treated as part of the soil for the purposes of land revenue.

During the Moghul period, as it appears from the Ain-I-Akbari, mines were not so much known in Subahs of Bengal, Bihar and Orissa. Abul Fazl has mentioned in some detail the mines in Arakan but he has mentioned only the iron mines in Sarkar Bazoha and the diamond mines producing chiefly very small stones at Harpah in Sarkar Madaram, both in Subahs of Bengal[2]. But Mr. W. H. Moreland referring to copper mines in Chotanagpur contends that: "since Fazl's account of them is obviously based on very imperfect knowledge, his silence in the matter is not conclusive.[3] The learned writer also refers to the fact that coal was not mined in India at this period, and the production of iron and copper was limited by the quantity of fuel available within the reach of the places where the existence of ores was known[4].

According to the Mahommedan theory, "*Wuzeefa Khiraj*" recognised a proprietary right in the cultivator or tax-payer. This right was however, only "to the productive power of the soil without which the cultivator would not be able to meet his liability for *Khiraj*,"

1. Manu's Land and Trade Laws by R. S. Vaidyanatha Ayyar, p. 69.
2. Ain-I-Akbari by Abul Fazl translated by Colonel H. S. Jarret, (1891) Vol. II, pp. 120, 124.
3. India at the Death of Akbar, An Economic Study, (1920) p. 149.
4. *Ibid.*, p. 147.

but not necessarily to the soil itself and the minerals in it[1]. That this was the extent of the proprietary right is also apparent from the crops basis of assessment in Akbar's ten years' settlement[2]. Under the Moghuls there were non-agricultural imposts too. Had mines been worked extensively under private enterprise they would have certainly formed a distinct source of Imperial Revenue.

Our land system is a curious amalgam of the Hindu, Mahomedan and Indo-British laws. The contest between the tenure-holder and the Zamindar over mineral rights is now at an end. A series of decisions of the Privy Council and the Indian High Courts have held that a Zamindar is presumed, in respect of lands within his Zamindari, to be the owner of the underground rights thereto appertaining in the absence of evidence that he ever parted with them.

There has been so far no direct decision on the rival claims of a Zamindar and the Government regarding mines. In the *Pachete Raj Case* (*Secretary of State* v. *Jyoti Prasad*, A.I.R. 1926 P.C. 41) there was no doubt an issue: "Was the mouzah in suit permanently settled by Government with the plaintiff's (Jyoti Prasad's) ancestors and is the plaintiff by right of such settlement entitled to the mineral rights under the mouzahs?". It was held by the High Court at Calcutta that the mouzah was within the permanently settled estate and that Jyoti Prasad was the rightful owner of the minerals in the mouzah and that none of the defendants which included the Secretary of State for India had any right to the minerals in the disputed mouzah. The Privy Council reversed the decision of the High Court on another ground *viz.*, that the mouzah was not within the Zamindari of the Raja and expressly left open the question of mineral rights between the Crown and the Zamindar. In *Nageshwar Bux Roy* v. *The Bengal Coal Co., Ltd.*, A.I.R. 1931 P.C. 186 where conflicting views were held by the Subordinate Judge and the High Court, the Privy Council expressly left the question open and proceeded on the assumption that the Zamindar's title embraced rights to minerals. In *Secretary of State* v. *Srinivasachariar*, (1920) I.L.R. 44 Mad. 421=40 M.L.J. 268, where some Shrotriamdars sued the Secretary of State for India for quarrying stones, the suit was decided in favour of the Secretary of State on the construction of the particular grant which was the foundation of the plaintiffs' claim. Sharp differences of opinion exist amongst eminent writers on the subject of land tenures, on the question, who as between the Zamindar and the Crown, is entitled to the subsoil rights.

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1. Phillips' Land Tenures in Lower Bengal, Tagore Law Lectures, (1874-75), p. 47 citing Baillie's Land Tax.

2. Ain-I-Akbari, op. cit. Vol. II, p. 88, *et seq.*

One school of thought led by Phillips holds that the minerals vest in the Crown, and another school led by Dr. Field and Mr. Justice Sarada Charan Mitra holds that by the permanent settlement the mineral rights have been conferred on the Zamindars.

In the opinion of Mr. Justice S. C. Mitra:

"The Anglo-Indian Government has, by the Permanent Settlement, accepted fixed sums as revenue in lieu of all rights it had either as proprietor of the soil or as protector of its subjects. It reserved no right whatsoever, except as treasures under the Treasure Trove Act (Act VI of 1878). Minerals must necessarily pass with the right to the surface. The present theory of the proprietary right of the Government is not consistent with the Hindu theory of the King's right to a share of the produce or of hidden treasures and minerals and the Anglo-Indian Government, having accepted and acted upon the theory of the proprietorship of the soil, cannot now claim a share of the minerals on the latter theory."[1]

Two years before Mr. Justice S. C. Mitra delivered the above lectures, Dr. C. D. Field in his Introduction to the Regulations of the Bengal Code, (page 46, Section 34) observed thus:

"A Zamindari tenure is an absolute right of proprietorship in the soil, subject to the payment of a fixed amount of revenue to Government. If this revenue fall into arrears the estate may be put up to auction and sold to the highest bidder. The purchaser acquires the estate free of all incumbrances created since the time of the Permanent Settlement, and obtains statutory title. A Zamindari is inheritable according to the law of succession by which the proprietor is governed. It is assignable in whole or in part. It may be mortgaged. *The Zamindar can grant leases either for a term or in perpetuity. He is entitled to rent for all land lying within the limits of his Zamindari, and the rights of mining, fishing and other incorporeal rights are included in his proprietorship.*"

The Privy Council has approved the portion in *italics* in *Hari Narayan Singh Deo* v. *Sriram Chakravarti*, (1910) 14 C.W.N. 746 at 751 to show that the Zamindar is entitled to mineral rights as against the holder of a Debottar tenure. Mr. R. Sinha, the learned author of The Law of Landlord and Tenant in Bengal and Bihar (at page 238) has pointed out, and rightly too, that Dr. Field;

"was not considering, in the above passage referred to the relative rights of the Zamindar and the permanent lease-holder under him but rather the relative rights of the Zamindar with whom a permanent settlement had been made and the state."

The view of Dr. Field regarding a Zamindar's right to lease mines derives support from S. 37 of Act XI of 1859 (The Bengal Land Revenue Sales Act). By the time when the perpetual settlement was made the tract covered by that settlement had not disclosed mines or minerals of any great value in its ordinary soil and possibly this accounts for the paucity of controversial literature worth the name in respect of the rights to the mines etc., unlike other matters connected with the land revenue system. There was no investigation of the title preceding the enactment of the Regulations. Nor would

1. The Land-Law of Bengal (with Bihar and Orissa) Tagore Law Lectures (1895) 2nd Edn., 1921, p. 485.

it be correct to say that any question of title was decided as the result of the Permanent Settlement. The basis of the assessment in the language of Baden Powell (The Land Systems of British India Vol. I, pp. 414, 415), was that,

"in order to determine the assessment of each estate no inquiry was made (as under the late settlement procedure) either what the produce was, or what the "rents" were as paid by the raiyats. Reference was simply made to the old records of the lump assessments under the native rulers ; and these were roughly adjusted in cases where such adjustment was needed, and the Zamindar or other owner was directed to pay this sum."

Scrutiny was prohibited, says Baden Powell, for fear of making the Zamindars distrust the promise of a Permanent Settlement, and think that the information supplied would be used to enhance the revenue afterwards.

The Zamindars under the Mahomedan Government were mere contractors, collectors, or farmers of revenue receiving a percentage for their trouble and responsibility and small grants of land in the shape of *Nankar* or *Chakran* for their subsistence. We get a glimpse of this in the Sanad for the Zamindary of the Hon'ble East India Company's lands given in 1757 under the seal of Nawab Meeron, Dewan of Subah Bengal. The Zamindari is called an office from which after the expiration of the year the Company is to take a discharge according to custom[1]. It is presumed that the Permanent Settlement made this office hereditary. In the opinion of Mr. Harrington,

"A Zamindar appears to be under the Moghul constitution and practice, a landholder of a peculiar description, not definable by any term in our language."[2]

In the Asiatic Quarterly Review, (July, 1894), Baden Powell has pointed out that in itself the word "*Zamindari*" means (1) the right to the revenue share, (2) the right to dispose of waste and unoccupied lands, and (3) the right to certain mineral royalties etc.[3] But it is clear from the mode of the assessment for the State dues under the Moghuls that mines and minerals did not at all come into the picture perhaps because of its unknown or less known character. In practice then the Zamindari rights were not as large as the meaning given thereto by Baden Powell. At least this much is certain that mines and minerals were not up to the time of Akbar developed to an extent which could invite the attention of men like Todar Mull and Abul Fazl.

1. A collection of Treaties, Engagements and Sanads compiled by C. U. Aitchison, Vol. II, p. 206, *et seq.*

2. Harrington's Analysis, Vol. II, p. 400 cited in the Great Rent Case, (1865) 3 W.R. Act X Rulings pp. 29 and 31.

3. *See* Firminger's Edition of Fifth Report, Vol. I, Introduction, p. 38.

Coming to more modern times we find that even before 1778 in Beerbhum Zamindary the revenue derived from iron ore within the limits of the Zamindary as well as the assessment paid by the Zamindar to the Government on that account had been "kept distinct from the general land revenue, and entered in the accounts of both the Zamindar and the Government as a separate article" under the denomination of "*Loha Mehal*", perhaps to be distinguished from land mahal.[1] The iron ore was then the subject matter of distinct Government assessment. This shows how the rights to mines and minerals would have been treated had their existence in abundance been known to the early British rulers.

The Permanent Settlement Regulations do not purport to deal directly with mines and minerals. It is to the agriculture of the country that the Regulations are addressed and they were solely concerned with strengthening the sinews of land revenue. S. 1 of Bengal Regulation I of 1793 shows that the Regulation was "relative to the limitation of public demand upon the lands": or in other words it deals with land revenue. Baden Powell observes:

> "If we cannot be content to speak of 'land revenue' and must further define, I should be inclined to regard the charge as more in the nature of a tax on agricultural income."[2]

Let it be said here that the learned author in his work did not direct his special attention to mines and minerals. He says (at p. 238 of Vol. I, *Ibid.*), that "the reservation of a right to mines and minerals and earth oil hardly concerns us in this manual." Then again by S. 7 of Regulation I of 1793 the Governor-General in Council trusts

> "that the proprietors of land, sensible of the benefits conferred upon them by the public assessment being fixed for ever, will *exert themselves in the cultivation of their lands*................"

Again in S. 1 of Bengal Regulation II of 1793 we find,

> "Land must in consequence become the most desirable of all property and the industry of the people will be directed to those improvements in *Agriculture* which are as essential to their own welfare as to the prosperity of the State."

It does not also accord with the scheme of such a settlement which had limited in perpetuity the demand of the State to the share in the annual produce of every *bigha* of land that any person taking under it should have the power to consume its subject-matter by working mines, extracting minerals and by quarrying operations even if an interest in land was created. When mines are worked the capital value of the land is gradually diminished because the land without the minerals, *etc.*, is often worth very little.

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1. Guroo Pershad Bose v. B. Hayara, (1811) 1 Sel. Rep. 452 : 6 I.D.O.S. 311.
2. The Land Systems of British India, Vol. I, p. 240.

The anxiety of the State to protect its revenue as derived from land in the permanently settled tracts is manifest from the enactment in the same year and on the same date, 13th May, 1793, of Bengal Regulation XLIV of that year, along with Regulation I of 1793. This was

> "A Regulation for prohibiting the Jumma of dependent Talooks, or granting Leases or Pottahs from a term exceeding ten years; and, in cases of Lands being disposed of at Public Sale for the discharge of arrears of Public Revenue, for rendering null and void all Engagements (with certain exceptions) subsisting between the defaulting Proprietor and his dependent Talookdars, Under-farmers, and Ryots, from the payment of Rent or Revenue on account of the Lands so sold."

Apprehension is expressed in the preamble of the Regulation XLIV that reduction or under-rating of Jumma and letting of land in farm or granting Pottahs for cultivation, at a reduced rent for a long term or in perpetuity if held valid would, "occasion a permanent diminution of the resources of Government arising from the lands," in the event of the rent or revenue reserved being insufficient to discharge the public demand. Commenting on this Regulation the Privy Council in *Ranee Surnamoyee* v. *Maharaja Satish Chandra Roy*, 10 M.I.A. 123, 145, 146 stated that, "the object of the Government was that the Jumma should be duly paid and the means of paying it should not be withdrawn." Much less then the working of mines which practically eats up the corpus of the property would have been countenanced by the then legislators without making up the loss due to this diminution in the capital value of land meant for cultivation by further non-agricultural assessment for this exceptional use of land for other than agricultural user.

Regulation XLIV of 1793, referred to above, by section V and VIII protected a lease or pottah

> "for ground for any term of years, or in perpetuity, for the erection of dwelling houses, or buildings for carrying on manufactures, or for gardens, or other purposes, and for offices for such houses or buildings,"

from enhancement or dispossession whenever the whole or any portion of the lands of any Zamindar, independent talookdar, or other actual proprietor of land was sold for the discharge of arrears of the public assessment. S. 30 of Regulation XI of 1822 was almost similar to S. VIII of Regulation XLIV of 1793 with only leases for tanks, canals, and water courses added to it. So far then there is no reference to mines. An Act for amending the Bengal Code in regard to Sales of Land for arrears of Revenue was passed in 1841 as Act XII of that year. S. XXVII (4) protected:

> "Lands held under *bona fide* leases at fair rents, temporary or perpetual, for the erection of dwelling houses, or manufactories, or *for mines*, gardens, tanks, canals, places of worship, burial grounds, clearing of jungle, or like beneficial purposes, such lands continuing to be used for the purposes specified in the leases."

It was the Land-holders' Society which suggested the insertion of the words, " mines, minerals and quarries and such buildings as *bona fide* appertain to such works, and are necessary for carrying them on.[1] The only change that has been made in the Bengal Land Revenue Sales Act XI of 1859 in its protecting section 37 (which corresponds with S. 27 of Act XII of 1841) is in regard to "leases of lands...... wherein mines have been sunk." The above provisions are no doubt meant for the purchaser at a revenue sale. It may very well be urged that here at least is a statutory recognition of the Zamindar's right to lease mines, for if it is not so what was then the necessity for protecting them by legislation? It should be noticed that the word ' lease ' in the fourth Clause to S. 37 of Act XI of 1859 (The Land Revenue Sales Act) does not only mean a lease from the Bengal Zamindar but includes also a lease granted by a tenure-holder for purposes of the clause (*Kiron Chandra Roy* v. *Naimuddi Talukdar*, I.L.R. 30 Cal. 498). The Hon'ble H. T. Prinsep in his Minute, dated 8th July, 1841 in connexion with the enactment, Act XII of 1841 (Act I of 1845 is also in same terms) says,

" nor do I object to the 4th clause which provides for building, lease for gardens manufactories, mines, clearing of jungle, and other purposes manifestly beneficial and creative of fresh assets to an estate or such as obviously are in their nature perpetual. In such cases if the new purchaser gets the fair rent of the land prior to its being turned to such purposes, he gets all that the Government had a right to look to as the security for its revenue. The new value created ought not to pass to the purchaser as a part of the estate hypothecated to the Government by the act of Settlement."

Lease for working mines, etc., are not creative of such fresh assets which are in their nature perpetual. If it is conceded that the new value created is not a part of the estate hypothecated to the Government by the Act of Settlement as the Hon'ble H. T. Prinsep seems inclined to hold the very foundation of the claim of the Zamindars to mineral rights by virtue of the permanent Settlement is taken away. There is no manner of doubt that the estate that was created in favour of the Zamindar by the perpetual Settlement remained hypothecated for the revenue which is an absolute first charge. If leases of mines were not hypothecated by the act of Settlement so as to be answerable for the punctual realisation of the revenue they did not then form part of the Settlement too. The provisions of the Revenue Sale Law were enacted in connection with the realisation of " land revenue " and it may be that the legislature having made secure the land revenue showed some eagerness for the development of mining industry. It may be mentioned that Act V of 1859 was among other things, meant " for the develop-

1. Collection of Papers regarding Amendment of the Sale Law, Part I, (Act XII of 1841), Bengal Government Press, 1927, P. 313.

ment of the mineral resources of the country "in which the Ghâtwali lands are situate. In contemporary literature given in the Collection of Papers already cited above there is no trace of the legislature, in enacting the above provisions of the sale law, having ever directed its attention to the question whether the Crown has any right to minerals against the Zamindar apart from its demand for land revenue.

By way of a parallel for the interest in land which had been conferred upon the Zamindars by the perpetual settlement the English Estate in fee simple is often mentioned by almost all writers on the subject. The fee simple is the largest possible estate in the realm of real property. In English law mines and minerals in and under the surface (except gold and silver which belong to the Crown) unless they have been severed from the surface belong to the owner of the land. *Cujus et solum ejus est usque ad coelam et ad inferors* (Co. Litt. 4) is a maxim of English Real Property Law. The maxim means " whose is the soil, his is also that which is above and below it." In Broom's Legal Maxims the following remarks occur :—

> " Not only has land in its legal specification an indefinite extent upwards, but in contemplation of law it extends also downwards, so that whatever is in a direct line between the surface of any land and the centre of the earth, belongs to the owner of the surface ; and hence the word "land," which is *nomen generalissimum*, includes not only the face of the earth but everything under or over it ; and therefore, *if a man grants all his lands he grants thereby all his mines, his woods, his waters, and his house as well as his fields and meadows.*"

The Privy Council have held that this presumption as to the extent of the grant when a man grants all his lands does not apply in India. In *Venkata Kumar Mahipati Suryarao Bahadur Guru* v. *Secretary of State*, A.I.R. 1929 P.C. 152 at p. 155, the lower courts based their conclusion that the underground rights passed by the original grant, upon a presumption that in the absence of evidence as to the terms of the grant the grantor passed all that he had to the grantee. The P. C., points out :—

> " Such a presumption would be contrary to many decisions of their Lordships' Board in which it has been from time to time pointed out that the rules of English Law as to real property in England can afford no guidance as to what has passed under an Indian grant."

In this case the terms of the grant were wanting and in the case of a statutory grant embodied in the Permanent Settlement Regulations, the rights as to the subsoil are without doubt ambiguous. This view of the Privy Council has the effect of shaking if not demolishing the position taken by Mr. S. C. Mitra when he says that because the Government did not reserve any right whatsoever except as to treasure by the Treasure Trove Act, 1878, minerals must necessarily pass with the surface. In the Regulations themselves there is no reservation as to treasure trove. If the legislature

could properly legislate about treasure troves after the perpetual settlement as far back as 1878 and Mr. Justice S. C. Mitra had nothing to comment regarding the propriety of such legislation, how can it be contended that minerals must necessarily pass with the surface because Government did not reserve any right?

Nor does legislation regarding it show that the rights to subsoil were not in the State or that the latter has given them up. Moreover, there is a fundamental distinction between treasure trove and subsoil minerals. In the early days of man's progress the chance finding of both of them had led people to group them together and in this form they crept into legal literature. (Manu VIII, 39). In legal conception they are widely apart; treasure trove is assumed to have an owner at one time though no one can tell who is the owner of it. Legislation for the one does not mean the giving up of the rights in the other.

The report of the Bengal Land Revenue Commission appointed on November, 5, 1938 with Sir Francis Floud as Chairman has come out. The acquisition of royalties from mines is recommended by the majority. Whether or not this recommendation is accepted, it is recommended by the majority that Government should consider the desirability of legislation declaring that all minerals including oil, not yet worked or discovered will vest in the State. But in a note of dissent appended to the Report the acquisition of minerals is objected to and it is claimed that the right in oil or undiscovered minerals could not vest in the State without payment of compensation.

Whether user of land by the Zamindars for other than agricultural purposes was contemplated by the Permanent Settlement Regulations may be presumed. An analogy though not perfect, may be seen in the statutory vesting of a street in a Municipality where the land over which the streets are formed have not been acquired by the Municipality either by purchase or otherwise. Such vesting does not transfer to the Municipality the rights of the owner in the site or soil over which the street exists. The Municipality does not own the soil from the centre of the earth *usque ad coelum*, but it has the exclusive right to manage and control the surface of the soil and so much of the soil below and of the space above the surface as is necessary to enable it to adequately maintain the street as a street.[1] The latest Indian case on the point is *Chhotalal Panachand* v. *Borough Municipality of Nadiad*, (1940) 187 I.C. 166 (Bom.) Under the English and Indian Law the statutory vesting of a road means the

1. *See* Coverdale v. Charlton, (1879) 4 Q.B.D. 104 and other cases cited in The Law of Municipal Corporations in British India by P. Duraiswami Aiyangar (Second Edition, 1924) pp. 489-490.

vesting of the soil or the surface soil only and not the subsoil. The distinction between the words "Soil" and "Surface" has been clearly recognised.[1]

Dr. Field is of the opinion that the proprietary right conferred by the Permanent Settlement on the Bengal Zamindars was really an estate (in the legal sense) of much greater dimension than the English fee simple. Not only were all other estates destroyed to create it, but by the device of the sale law, as often as the Government revenue (Land-tax) was not paid, all subordinate estates created since the Permanent Settlement, were annihilated and the higher estate handed over to the new possessor free of incumbrances.[2] Under the heading "Modern Legal view of the Zamindari Title," Baden Powell observes :

> "The actual right of the landlord, as it now exists, is an estate in the soil certainly less than a "fee simple" of English law, but freely heritable, and alienable and available for mortgage, sale, gift, or bequest."

(Land-systems of British India, Vol. I, Book II, p. 523.) In *Thakooranee Dassee* v. *Bisheswar Mukherji* (The Great Rent Case), 1865 3 W.R. Act X Rulings, p. 29 at p. 34, Trevor, J., observed :

> "that the notion of an absolute estate is as alien from the Regulation law as it is from the old Hindu and Mahomedan law of the country."

Macpherson, J., (*ibid.*, at p. 44) stated :

> "As regards legislation from 1793 down to Act I of 1859, it, in my opinion, shows clearly that the Zamindar never was, and was never intended to be, the absolute proprietor of the soil. He never was proprietor in the English sense of the term."

Seton Kerr, J., (*ibid.*, at p. 76) was of opinion,

> "that by a reference to the whole course of legislation on this important subject from 1793 downwards, as well as to facts disclosed by Indian History, neither by Hindu, by Mohemadan, or by Regulation Law, was any absolute right of property in land vested in the Zamindar *to the exclusion of all other rights : nor was any absolute estate, as we understand the same in England, created in favour of that class of persons.*"

It may be quite legitimately said that the fifteen Judges of the Calcutta High Court were in the above mentioned case, called upon to decide a dispute between a Zamindar and a ryot and the observations quoted above regarding the status of the Zamindar were in relation to the ryot only. All the same, they go to show that the Zâmindar had no "absolute ownership" in the English sense of the term. The contract between the Government and the Zamindar is simple and well-understood, as long as we do not try to

1. *See* the Law of Highways on Land and Water in British India by Barada Kanta Banerjee, (1939) pp. 262-263; Calcutta Municipal Act, III of 1923, Sec. 295; Bengal Local Self Government Act, III of 1875, Sec. 73 as amended by Act XXIV of 1932 Sec. 45.

2. Introduction to the Regulations of the Bengal Code (1893) p. 44, f.n. 1.

combine the ideas of English tenures with it. The Zamindars are not landholders in the English sense of the word.

Mr. Phillips in his Land Tenures of Lower Bengal (T. L. L. 1874-75 at p. 318) has pointed out that it is now the opinion of most authorities on the subject that actual rights of the ryots were proprietory rights.

"They were not derived from or carved out of an original theoretically complete proprietory right in the Zamindari, in the way that all interests in land in England are theoretically derived from or carved out of the fee simple."

It is a strange coincidence that this view of Mr. Phillips found favour with the Privy Council in the very year 1875 in *Sonet Kuar* v. *Himmat Bahadur*, (1875) 1 Cal. 391 (P.C.). This was a case of escheat of a permanent tenure. On behalf of the Zamindar, Mr. Arathoon contended before their Lordships that a Mokurrari tenure not being an independent estate, but being carved out of the Zamindari, has no independent existence and consequently reverts on failure of heirs to the Zamindar, the superior lord, rather than to the Crown. To this their Lordships held that the principles of English feudal law are clearly inapplicable to the Hindu Zamindar: In *Raja Jyoti Prasad Singh Deo v. The Lachipur Coal Co.*, (1911) 14 C.L.J. 361 at p. 366, it has been observed

"that the fact that a permanent tenure escheats to the Crown does not really negative the supposition that the landlord's reversion to mineral right subsists."

This observation, if we somewhat limit the meaning of the word "reversion" is certainly correct. What escheats to the Crown is the tenure and nothing more. Nor does the observation affect the question under discussion in any way. The question is whether the Crown as Lord Paramount has any right to mines, etc., as against the Zamindar.

Mr. Phillips fully anticipated the rival claims between the Zamindar and the Government that were likely to arise by the time "the soil itself acquires a value distinct from the right to occupy and cultivate it." (Land Tenures in Lower Bengal p. 320). He observed: "The result seems to be that even if the Zamindars were thought to be absolute proprietors, they are not declared to be so, but the contrary; and that the term "actual proprietors of the soil" does not mean absolute proprietors of the soil as against the ryots; and that consequently, *as the Government do not declare any intention of giving up to the Zamindars anything but the right to alter assessment, there is nothing to show that the terms used are meant to render the Zamindars absolute proprietors as regards the Government, except in the matter of permanency of revenue*...... Perhaps the questions now discussed may be long before they acquire any practical importance." But the eminent lecutrer however, thought it essential to endeavour to ascertain what was the real effect of the Permanent Settlement. He cited the instance of *Loka*

Mehal, (*Gurroo Perskad Bose* v. *B. Heyra*, (1811) 1 Sel. Reg. 337 : 6 I.D.O.S. 311) in Beerbhoom Zamindari to show "that in practice the right to the soil itself is found separated from the right to the cultivation. The Permanent Settlement in this case does not seem to have been considered to entitle the Zamindar to the minerals as part of the soil for which he was settled with as actual proprietor."

"It is true the settlement for the minerals had been made with the Zamindar, the convenience of such a course being obvious; but the separate assessment and separate conveyance of the Loha Mehal were considered sufficient to show that the Loha Mehal was held in a different right from the Zamindari." (Land Tenures in Lower Bengal p. 422.)

The words "proprietors of the soil" as used in the Bengal and Madras Codes have a technical significance. They could not have been used by the framers of the regulations in the sense in which they would naturally be understood[1].

The term "actual proprietors" says Mr. Phillips

"does not mean what might be supposed *prima facie* but something less, and considering the way in which it is used in a mere enumeration of the persons to be settled with, and unaccompanied by any declaration in the Regulations or proceedings relative to the Decennial Settlement of an intention to confer any proprietary right upon the Zamindars which they did not otherwise possess, save the exemption from alterations in the assessment, it seems to me, with the utmost submission to the authorities which have been referred to, that there is no necessity for enlarging the meaning of the term beyond the actual proprietary right which did exist, especially when, as we have seen, the terms used do not mean that every person actually settled with is an actual proprietor in any sense except that of being actual possessor."

In the Report of the recent Bengal Land Revenue Commission, explaining the constitutional position, the majority express the opinion, that the Permanent Settlement can no longer be regarded as exempt from any modification that may be called for in the national interest. The Majority Report states :

"Whatever may have been the obligations of the British Government as successor to the East India Company, the grant of Provincial Autonomy has created a new situation under which the Government of Bengal is free to consider the problem afresh and to adopt any modifications which they may consider desirable under present conditions. Indeed the appointment of the Commission itself and its terms of reference are evidence that there is no legal or constitutional bar to the reconsideration of the Permanent Settlement, or to its replacement by any other system which is better adapted to the conditions of the present time."

Now the question remains whether the claim of the Crown to subsoil rights has been concluded (1) by the decisions which have held that the Zamindar has the underground rights as against his tenants unless he has expressly parted with them, and (2) by the dis-

1. Jumar Kamakshya Narayan Singh v. Bhuvaneshwar Lal Singh, A.I.R. 1928 Pat. 516 at pp. 526-527, Per Das, J., and the authorities cited therein.

claimer (a) of the Secretary of State for India in his despatch dated 25th March, 1880, (*b*) of the Secretary to the Board of Revenue in his letter dated 9th January, 1872 to the Government of Bengal, (*c*) of other officials in their reports, etc., such as Millet's Report dated 26th March, 1842 (See *Brajanath Bose* v. *Raja Durga Prasad*, 12 C.W.N. 193 at p. 212), (*d*) in the Rules published under the authority of the various departments of local Governments, *e.g.*, Rule 8 of Part II (Rules relating to the Waste lands and Minerals) in the Bihar and Orissa Waste Lands Manual, (1918) which runs thus:

"Except in permanently settled estates, it is presumed throughout India that, in the absence of any distinct judicial precedent or proof of established usage, the state has the right to the minerals."

In the absence of any decision directly settling the issue between the Crown and the Zamindar it cannot be contended that the question has been set at rest. In *Sashi Bhusan Misra* v. *Raja Jyoti Prasad Singh Deo*, (1916) 21 C.W.N. 377 (P.C.) at p. 381 (a case between Zamindar and Talabi Brahmottardar for mineral rights) the Lord Chancellor no doubt observed :

"Now by the Permanent Settlement of 1793, all the mineral rights were confirmed to the Zamindars."

This observation may be explained away as an *obiter dictum*. But on that ground alone it cannot be brushed aside. In *Mata Prasad* v. *Nageshwar Prasad*, 52 I.A. 398 at p. 417 the Privy Council has pointed out that it is not open to the courts in India to question any principle enunciated by the Board " although they have a right in examining the facts of any case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular case."

From other decisions of the Privy Council and the opinions expressed by eminent High Court Judges in India it can however be said that the Privy Council did not definitely decide the point now raised nor finally. In *Raja Durga Prasad* v. *Brajanath Bose*, (1911) 16 C.W.N. 482 (P. C.) at p. 488, overruling the High Court's view that the Government was a necessary party to a dispute relating to minerals, Lord Macnaghten held :

"In their Lordships' opinion the Government is not a necessary or a proper party in this suit. Apparently the Government does not claim the minerals under permanently settled estates. However that may be, the Government has never claimed the minerals under the two Mouzahs or either of them, or put forward any claim inconsistent with the rights now asserted by the Zamindar. The rights of the Government, whatever they are, will not be prejudiced by the result of a suit to which it is not a party."

The above remarks have been quoted by Das, J., in *Debi Singh* v. *F. E. Christian*, A.I.R. 1924 Patna 776. In *Kamakshya Narayan Singh* v. *Thakur Jado Charan Singh*, A.I.R. 1928 Pat. 294 at p. 303 Mullick, J., observed :

"If he is a Zamindar of permanently settled estate under the Regulations of 1793 he is the owner of the soil and whatever may be the claim of the Crown against him, it cannot be denied that as between himself and a tenure holder he has a right to the minerals unless he has expressly parted with them."

In *Secretary of State* v. *Jyoti Prasad*, I.L.R. 53 C. 533. Lord Phillimore delivering the judgment of the Board observed:

"The question whether the mines or minerals belonged to the land owners or to the Government is a far-reaching one, on which they would be unwilling to embark without having the fullest assistance of counsel,"

and the case was decided on another ground. Their Lordships also guarded themselves against endorsing the view of the High Court which, decided the question of mineral rights in favour of the permanently settled Zamindar as against the Secretary of State, by saying that they were not to be held to have given any authority to that part of the decisions of the courts below which they did not touch.

In *Nageswar Bux Roy* v. *The Bengal Coal Co., Ltd.*, L.R. 58 I.A. 29, the title of the proprietor of the Bisrampur estates in Bihar to the ownership of the minerals was challenged by the Bengal Coal Co., Ltd. The High Court held that "the title to the mineral rights in question was at least till 1895 and probably still is vested in the Government": when the matter came before the Privy Council attention was drawn to the fact that the Government was not a party to the case, although important questions "possibly affecting the title of the Government to minerals in India generally were raised." The appeal was allowed to stand over to ascertain the attitude of the Government. In reply to their Lordships' communication, the Secretary of State for India intimated that the Government did not propose to intervene in the appeal. The appeal was thereafter disposed of by the Privy Council "without expressing any opinion as to the soundness" of the view taken by the Patna High Court assuming that the proprietor's title embraced the mineral rights in question.

Again in *Gobinda Narayan* v. *Shama Lal*, L.R. 58 I.A. 125 the Privy Council citing its earlier decision in 16 C.W.N. 432 (P.C.) observed:

"...... the question as to subsoil rights stands upon a different footing. These at all events *where not claimed by the Crown* will be presumed to be in the Zamindar."

Following this Privy Council case, Noor, J., in *Mukta Keshi Patrain* v. *Midnapur Zamindari Co., Ltd.*, A.I.R. 1935 Pat. 33 held that

"the Government is not a party to this suit and is not bound by this decision but as between the plaintiff and the defendant the right in minerals is certainly with the plaintiff. No claim so far has been made by the Government."

It is, therefore clear that the claim of the Crown against the Zamindar regarding mineral right is not a closed question. The

recent tendency of judicial decisions does not preclude the possibility of the Government claiming the subsoil rights in permanently settled estates.

The next point to be considered is as to the effect of the various disclaimers on the part of Government officials of mineral rights. The right to the minerals, it is said, must belong either to the Government or to the Zamindar. But the Government has expressly given up rights to the mines, etc., in favour of the Zamindar in permanently settled estates. In the absence of the Government therefore the Zamindar owns the mines. Have those acts and declarations of officials any creative or disentitling force? One aspect of this point of view assumes the position that the minerals were vested in the Crown even after the Permanent Settlement till they were not disposed of by the disclaimers and the other aspect is that the disclaimers merely confirm what was already in the Zamindars and do not create anything.

The question is whether the events subsequent to Permanent Settlement have created in favour of the Zamindar equities, which if the acts and declarations of officials are found to be not valid, afford an answer to any possible claim by the Government to the subsoil rights. 21 and 22 Vict. C. 106 (An Act for the better Government of India) by S. 41 conferred on the Secretary of State in Council power to dispose of the real estate vested in the Crown in the manner therein prescribed. There is no information whether this disclaimer regarding the mines etc., was sanctioned by the Secretary of State in Council with the concurrence of a majority of votes at a meeting under S. 40 of the above statute. So far as the officials in India are concerned their acts and declarations were dependent for their validity on an adherence to the forms prescribed by statutes 22 and 23, Vict. C. 41.[1]

In *Municipal Corporation of Bombay* v. *Secretary of State*, (1904) I.L.R. 29 Bom. 580 at pp. 606, 607, Jenkins, C.J., held that the Crown comes within the range of the well-known equitable doctrine formulated in *Ramsden* v. *Dyson*, (1866) L.R. 1 H.L. at p. 170 by Lord Kingsdown thus :—

"If a man, under a verbal agreement with a landlord for a certain interest in land or what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation."

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1. *See* for further information, Government of India, Civil Account Code, Vol. I, Eighth Edition, (Second Reprint), 1935, Appendix, 8-F.

But we find that in *Srinivasa Prasad Singh* v. *Kesho Prasad Singh*, (1911) I.L.R. 38 Cal. 754 at p. 768, Mukherji J., assumed that it is well settled that the effect of the doctrine of equitable estoppel does not apply to the Government in the case of unauthorised acts or omissions on the part of its officers, and agents, nor are public officers concluded by acts done in their official capacity. Though individuals may be estopped by unauthorised acts of their agents apparently within the scope of their agency, the Sovereign power ought not to be bound by the *ultra vires* acts of its agents. In *Secretary of State* v. *Kasturi Reddi*, (1902) I.L.R. 26 Mad. 268 at p. 279 Bhashyam Ayyangar, J., has quoted Story's "Law of Agency" to show this distinction between private and public agents. The powers and duties of the Secretary of State for India are defined by statute and the Secretary of State for India in Council is not competent to act in excess of the authority delegated to him by the Crown.

In this connection it is pertinent to refer to *Secretary of State for India* v. *Srinivasachariar*, 40 M.L.J. 262=I.L.R. 44 Mad. 421 (P.C.). This case was no doubt decided on the construction of the particular grant. But the Privy Council had to deal with events subsequent to the grant which went to show that a higher title was conferred on the Shrotriemdar than what might have been originally thought of. Their Lordships among many matters considered the Regulations, land acquisition proceedings and Standing Orders relating to Inams. In the Standing Orders (edition of 1890) it was declared that "the state lays no claim to minerals in enfranchised Inam lands." But this was changed in the edition of 1907 in favour of claiming the share of the State in all minerals produced in lands held under Inam tenure. This vacillation on the part of the Government of Madras has been interpreted by their Lordships, "as justification for the expressions used and the actings on behalf of the Government in the land acquisition proceedings which were ambiguous and to some extent compromising. "And at most," concluded their Lordships "these proceedings can amount to no more than action taken under a misapprehension of the Government's legal rights, and this could not make the law one way or the other, nor could it affect the Government's title. As affecting the quarries none of *these matters* had any creating or disentitling force." If it is correct to say that at the date of the Permanent Settlement the Zamindar had no right to the minerals and it was vested in the Crown then the Crown's right to the minerals subsists notwithstanding the fact that the Secretary of State had declared his intention not to claim that right. The matter of course, does not rest here. Although the King can never be put out of possession in point of law, by the wrongful entry of a subject yet there may be an adverse possession (60 years) in fact against the

Crown, so as to give the possessor protection under the statute of limitation against the Crown. But the Privy Council in *Bhupendra Narayan Sinha* v. *Rajeshwar Prasad Bhakat*, I.L.R. 59 C. 80=58 I.A. 228 have held that there may be separate ownership and separate possession of separate portions of the subsoil for the purposes of adverse possession. Their Lordships have quoted in this judgment a passage from *Low Moor Co.* v. *Stanley Coal Co.*, (1876) 34 L.T. (n.s.) 186 which runs thus :

" It is true that in cases where a man has entered upon and taken possession of one seam of coal, and by lapse of time has acquired some title to it, the law will not assume that his possession extends to all other seams of coal lying under that particular one."

With this qualification Zamindars can have prescriptive right against the Crown. Although the Government may not be bound by the acts of its agents beyond their delegated authority as equivalent to expressions of will on its own part, yet for the purpose of affecting the Government with knowledge it may be fully represented by its agents. *Bhaskarappa* v. *Collector, North Kanara*, (1879) I.L.R. 3 Bom. 452 at p. 752.

JOTTINGS AND CUTTINGS.

Odd Expressions.—One or two questions of expression have lately been noted in Court. Thus when a witness repeatedly used the word " definitely " as an affirmative, Mr. Justice Humphreys commented on this overworked substitute for " yes ", and was informed by counsel that it was " B. B. C. English." In another case a King's Counsel gave a lesson in slang to a witness who had confessed that he did not know the difference between " being in bad " and being " on the mat." The man of law told him that the former was American and the latter English. Again, a witness used the expression a " tough crowd " in connection with certain business men and explained that he meant " a pretty hard lot." Mr. Justice Atkinson inferred that it meant the same thing as " hard boiled " and the leader in the case interpreted it as indicating " business men who will take extreme advantage within the limit of the law." Even to-day judges still tend to take a rather unfavourable view of the use of colloquialisms. Hilbery, J., has frowned hard on " pinch " for " steel," and Langton, J., has objected to "bluffing." When there fell on the ears of Judge Tobin at Westminster County Court the words " We find the proofs O. K." he checked the barrister who uttered them, saying "What does that mean? That is American. Let us have English in England. There seems to be an inferiority complex among the English. They all think the English language is not good enough."—*S.J.*, *1940*, *p. 559*.

Not Correct.—For punctiliousness of expression, Mr. Justice Littledale must have been hard to beat. He once held a declaration bad because it contained the words "A.D. 1834" instead of "In the year of Our Lord 1834." "Your client," he said to counsel, "has committed a blunder, Sir which can only be set right on the usual terms, sir. A. D. is neither English nor Latin, sir: it may mean anything or nothing, sir. It is plain, sir, that there is a material and traversable fact, and no date to it, sir." Hawkins, J., objected when he was told that it was difficult to keep witnesses "up to scratch." "Up to *what?*" he demanded. "I beg your Lordship's pardon," said counsel, "I mean to keep my witness in court." "That is better: I now understand you."—*S.J., 1940, p. 559.*

A Great Change.—The new order in the King's Bench, which brings in an ex-Chancellor to preside there in place of Lord Hewart, is a change of major importance. For one thing, Lord Caldecote's step down to the Bench after occupying the Woolsack constitutes an unconventional piece of legal history, though Lord Lyndhurst did much the same thing, when in 1831, he became Chief Baron of the Exchequer after resigning the Chancellorship which, however, he was to fill twice more, in 1831 and 1841. As for Lord Hewart, his eighteen years' tenure of office has been surpassed by three only of the score of Chief Justices who have sat in his place during the last two and a half centuries. The great Lord Mansfield has an easy lead with thirty-two years which Holt, C.J., and Cockburn, C.J., each in his generation, employed twenty-one years of judicial service to leave an individual mark on the development of the common law. —*S.J., 1940, p. 583.*

Lord Hewart.—Lord Birkenhead has already passed so far into legal history that it is hard to realise that only now is the active legal world saying good-bye to one who was his colleague as a Law Officer of the Crown. Of the man who was Solicitor-General when he was Attorney-General he wrote with strong appreciation: "I have never worked intimately with anyone whose mind marched more closely with my own upon the subjects which engaged them both." And again. "I had at all times the knowledge that nothing committed to him was ever bungled, that he developed an amazing skill in recommending the undesirable and in explaining the inexplicable"—such being all too often the hard lot of a Law Officer. (This praise has a characteristic note of F. E. Smith about it). Gordon Hewart liked company and talk and he was very popular among his parliamentary colleagues in the House of Commons. If all else failed he would be remembered there by the cocktail specially concocted for him one night in the dining room during the time when

he was Attorney-General. Its huge success made it into one of the stock lines and I am told that you are still understood if you say to the waiter : " Bring me an Attorney-General." But there is much else besides his good fellowship whereby the legal world will remember one of the most strongly marked personalities that Lancashire has sent into its midst.—*S.J., 1940, p. 583.*

BOOK REVIEWS.

" FOR NECESSARY ACTION " (Speeches and Judgments of Sir Douglas Young, Chief Justice of Lahore), Edited by Messrs. Shri Ram and V. M. Kulkarni. Published by Indian Cases Ltd., Lahore.

This little volume is a supplement to the earlier volume " For Necessary Action " published in 1938, which according to the Editors' Note, seems to have been accorded adequate response to justify further such publications.

Sir Douglas Young's speeches on many topics and on important occasions such as, the impending World War in 1939, the Judicial Officers of the Punjab Province, The Punjab Boys Scouts Association the Inaugural Address at the Punjab Bar Conference, The Foundation laying of the Physical Training College, the Golden Jubilee of Delhi Bar Association, etc., are collected here, which indicate His Lordship's many-sided interests and activities. To add a bit of variety to these somewhat uninspiring utterances, the Editors have chosen well to include Lady Young's " War Diary " giving us some of her Ladyship's stirring experiences in France during the eventful month of June 1940. Then follow some judgments of the Chief Justice, which are included evidently to complete the miscellany contained in this volume.

The purpose of a compilation like this may not impress the literary reader, but is sure to profit the legal practitioner, whose ambitions of becoming a sound judge require fastidious early mental training and discipline to cultivate detachment and fairness of mind.

" HUSBAND'S RIGHT TO BEAT WIFE ", by Anand S. Bhatnagar, B.A., LL.B., published by The Allahabad Weekly Reporter Office, 17 Zero Road, Allahabad. Price Rupee One.

Here have we an interesting title which is sure to create the necessary curiosity both in the legal profession as well as the lay public to know of the way in which law takes note of cruel tendencies in human nature. We are too often reminded of domestic unhappiness rendered unbearable, when added to temperamental unadjustabilities of married couples, the husbands turn out wife-

beaters. Every religion known to us, has only laid the strictest injunction on husbands to desist from the desire to beat their wives. Still we are surprised to learn of sayings like, 'woman is a cooking pot, strike her, who won't speak. Put your fur and you make it warmer, beat a woman and you make her wiser.' The Hindu as well as the Muhammadan Law have only enjoined upon the householder and husband the fairest treatment of women, and the very sacrament idea of the former elevates the conception of married relationship. No doubt extracts from Texts have been quoted to prove how in Hindu thought women, and especially wives, were considered to be mere chattels. But at the same time ample authorities can be gleaned from many sources where women have been accorded places of honour in domestic as well as public life in India of the past.

This pamphlet is the outcome of much provocation of thought owing to the recent decision[1] of the High Court of Madras, in 1936 reversing the Madura District and Sessions Judge's declaration of the husband's rights to beat wives, as coming under the 'General Exceptions' in the Penal Code.

One would do well to read this small volume in order to appreciate the value of restraint that is necessary for men to lead honourable lives. Wayward husbands, often falling into the clutches of bad temper and resorting to violence towards wives, would profit not a little by a perusal of the legal implications such an unseemly conduct on their part might create.

Though we should like to commend this book to the general public, we cannot ignore the numerous printing mistakes that mar the value of an otherwise interesting book.

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1. In re *Subbiah Goundan*, A.I.R. 1936 M. 788.

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THE LATE SIR SHAH MAHOMED SULAIMAN

In the death of Sir Shah Mahomed Sulaiman India has lost one of her most distinguished sons in the realm of law as well as science. After a brilliant academic career he was called to the Bar in 1910 and within a short time he had the unique distinction of being appointed Judge of the Allahabad High Court at the very early age of 34. He became the Chief Justice of that Court in 1932 and was appointed Judge, Federal Court in 1937. The Allahabad Law Reports and the Federal Court Reports bear eloquent testimony to his great learning and profound scholarship. His work on the Bench had been characterised by thoroughness, subtlety and acute analysis. His attainments in the field of Mathematics and Science have elicited universal recognition. His zeal and devotion in their pursuit even when engrossed in legal work were truly remarkable. His contribution to the cause of Muslim education has been extensive and as Vice-Chancellor of the Aligarh University he has rendered yeoman service. It is indeed a matter for profound regret that a life so full of promise and so rich in achievements should have been prematurely cut off.

CIVIL LIBERTIES AND S. 144, CRIMINAL PROCEDURE CODE

BY V. B. RAJU, M.A., I.C.S.

The necessity for safeguarding and upholding constitutional, civil and religious liberties and the undesirability of vesting extensive powers in executive officers can be illustrated by three important cases. They are the Full Bench decisions of the Madras High Court in *Sundaram Chetti* v. *Queen*[1], *In re Viswanadha Rao*[2], and *Pir Gul Hassan* v. *Crown*[3].

S. 144, Criminal Procedure Code which vests extensive powers in the District Magistrate reads as follows :—

> " Where in the opinion of a District Magistrate or certain other Magistrates there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may by written order stating the material facts of the case . ... direct any person to abstain from a certain act .... if such Magistrate considers that such direction is likely to prevent or tends to prevent ...... danger to human life, health or safety or a disturbance of public tranquillity or a riot or an affray."

The effect of the Madras and Karachi decisions is to give very wide powers to Magistrates to interfere with civil liberties. It is only necessary for the Magistrate to say that he apprehends a disturbance of the public tranquillity or a riot or an affray to arm him with powers to suppress civil liberties and no court can go into the question, whether the opinion of the Magistrate is justified or not by the facts of the case.

I will now give some illustrations to show to what extreme lengths these two decided cases can be stretched.

A Hindu Social Reform League intends to hold a propaganda meeting to preach the desirability of introducing Divorce in the Hindu Law of Marriage. The Sanatanists or any other section of the Hindu community threaten a breach of the peace and make representations to the District Magistrate. And assuming that there was a genuine likelihood of breach of the peace, will the District Magistrate be justified in passing an order under S. 144, Criminal Procedure Code prohibiting the meeting?

Or, to take another illustration, if a section of the Muslims intend to organise a Pakistan meeting and the Hindus or any section of the Hindus threaten to break the peace, will the District Magistrate be justified in prohibiting the Pakistan meeting?

One more illustration would be sufficient to show to what absurdities we would be led to if the provisions of S. 144 Criminal Procedure Code are misapplied.

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1. I.L.R. 6 Mad. 203 (F.B.). 2. I.L.R. 51 Mad. 1006 (F.B.)
3. I.L.R. 1939 Kar. 751 (F.B.).

Will the District Magistrate be justified in prohibiting Church services if any section of the Muslim, or Hindu community takes it into their heads to threaten a serious disturbance of public tranquillity or a riot?

Further as the words in S. 144 are "in the opinion of a District Magistrate", the District Magistrate can act in an arbitrary manner and courts cannot go into the question whether there were grounds for that opinion. In the first illustration given above, a Sanatanist District Magistrate may prohibit the meeting to popularise Divorce among Hindus whereas a reformist District Magistrate may not.

The decisions in the Madras Full Bench cases and in *Pir Gul Hassan* v. *Crown*[1], rest on the ground that "the first duty of a Government is the preservation of life and property and to secure this power is conferred on its officers to interfere with even the ordinary rights of members of the community." Sir Charles Turner, C.J., at page 220 of I.L.R. 6 Mad. observed that there is "a distinction between rights which have a primary and rights which have a secondary claim to such protection as the Government can afford and where the Government cannot protect both classes of rights it may and it ought to abandon the latter to secure the former." But this is, with the greatest respect, an unacceptable method of reasoning. Government is assumed to be capable of protecting all classes of civil rights and not merely some. A Government which can protect only some rights and not others is not in reality a Government but only an apology for a Government.

In the Karachi case the learned District Magistrate addressed a letter to the Sub-Divisional Magistrate asking for information as to the Muslim public opinion with regard to the holding of the Luari Haj by the Pir of Luari—which was ultimately prohibited by an order under S. 144 Criminal Procedure Code—asking in particular whether orthodox Muslims consider the Luari Haj merely undesirable or definitely irreligious. The Sub-Divisional Magistrate replied on the same day stating that Muslim public opinion was very much against the holding of the Luari Haj and that even liberal-minded Muslims considered this Haj as very objectionable from the religious point of view. The letter concluded thus:—

"The result therefore is that Muslims consider this Haj which is held at Luari instead of at Mecca as 'batil' and definitely irreligious and they oppose it on the ground of the dictates of the Quaran more than on conventional grounds."

A few observations on this may be permitted. It is difficult to see why the question whether Luari Haj is "undesirable or definitely irreligious," should have been the subject of a report. This

1. I.L.R. 1939 Kar. 751 (F.B.).

case illustrates how Magistrates even with the best of intentions stray from the strict requirements of law. Even if the holding of Luari Haj is definitely undesirable and irreligious it should be permitted in the same way as a Hindu social reformers' meeting on Divorce. It would therefore be pardonable to assume that in coming to a decision whether there was a likelihood of breach of the peace the Sub-Divisional Magistrate took note to some extent at least considerations which should not have been considered, namely that the holding of Luari Haj was "definitely irreligious and opposed to the dictates of Quaran" to use the words of the Sub-Divisional Magistrate himself. The concluding part of the report of the Sub-Divisional Magistrate which has been quoted by Lobo, J., in his judgment merely states that Muslims consider Luari Haj as definitely irreligious and that Muslims oppose it on the ground of the dictates of Quaran. There is nothing in it to justify that there was a likelihood of a disturbance of the public tranquillity or a riot or an affray and that the only way of avoiding it was to pass an order under S. 144, Criminal Procedure Code, prohibiting the Luari Haj.

Assuming that there was a likelihood of disturbance of the public tranquillity, before an order can be passed under S. 144 Criminal Procedure Code prohibiting an act, it must be shown that that the only way of avoiding the breach of the peace would be by prohibiting the particular act. The special significance of the words, "There is sufficient ground for proceeding under this section" which are found in S. 144 Criminal Procedure Code, is not, it is submitted with the greatest respect, noticed in the Karachi decision.

The question of orders under S. 144 Criminal Procedure Code has also to be looked at from a different point of view. If the doing of an act is likely to lead to a breach of the peace by those opposing it the question will be whether the doing of the act is to be prohibited or the opposition to the doing of that Act. If the act in question is a peaceful exercise of a civil or religious liberty it is only the opposition to the act that is to be prohibited and not the peaceful exercise of a civil or religious liberty. Of course it may not be possible for the District Magistrate to speedily determine whether the act is a civil right or a civil wrong. In such cases he would be justified in prohibiting the act even if ultimately it turns out after an inquiry to be a civil right and not a civil wrong. In my view the significance of the words "sufficient ground for proceeding under this section" is that the District Magistrate has to be satisfied that the act is not a peaceful exercise of a civil or religious right or in the alternative that he has no time to decide that question. The District Magistrate has also to be satisfied that it is necessary to prohibit the doing of a particular act and not the opposition to it.

The passing of an order under S. 144 Criminal Procedure Code implies a power on the part of Government to enforce obedience to that order. If Government can enforce obedience to an order under S. 144 Criminal Procedure Code, it can equally well uphold constitutional, civil and religious rights. It will be dangerous to allow executive officers of Government to form the opinion that S. 144 Criminal Procedure Code allows Government officers to uphold only certain classes of rights and to suppress other classes of rights.

In *In re Viswanadha Rao*[1], which followed the earlier Madras case it was observed that " where there is a conflict between the public interest and a private right, the former must prevail." But I may be pardoned for the remark that it is in the interests of the public that private rights should be upheld.

Some recent decisions of the Madras High Court have expressed disagreement from the earlier Madras view. For instance, see *In re Devatha Sriramamurthy.*[2]

The view taken in 6 Mad., 51 Mad., and I.L.R. 1939, Karachi, can only be supported on the ground that in the preservation of the public peace it may be necessary to override temporarily private rights. These words are taken from the Full Bench judgment in 51 Mad. But the real importance of these observations is not, I am afraid, grasped by executive officers of Government.

In my humble view if a person intends to do an act which is a peaceful exercise of a civil or religious right and gives sufficient notice to the District Magistrate it would not be legal for the District Magistrate to pass an order under S. 144 Criminal Procedure Code directing him to abstain from the Act. For then having regard to the words " there is sufficient ground for proceeding under this section *and immediate prevention or speedy remedy is desirable* ", in S. 144 Criminal Procedure Code, it would not be legal for a District Magistrate to refuse to use the authority of Government to uphold civil or religious rights and liberties. For similar reasons it would not be legal for a District Magistrate to repeat the prohibitory orders at regular annual or other periodic intervals. It is the duty of Government to govern and after the temporary emergency has passed the Government should arm itself with sufficient power to uphold civil rights. The significance of the words " it may be necessary for them to override temporarily private rights " is that private rights should not be overridden *permanently* by the repeated renewal of orders under S. 144 Criminal Procedure Code. This aspect of the matter does not appear to have been considered by executive authority nor has it been noticed in any of the reported cases. Executive authorities are apt to form the impression that because High Courts

1. I.L.R. 51 Mad. 1006, 2. (1930) 60 M.L.J. 370.

have upheld the legality of an order passed by them under S. 144 Criminal Procedure Code interfering with the exercise of a private right they are given an implied licence by the High Courts to renew the order under S. 144 Criminal Procedure Code from time to time whenever the exercise of the private right is again threatened. But this, it is submitted, would not be a correct view. An order passed under S. 144 Criminal Procedure Code overriding a private right may be legal and justified by S. 144 Criminal Procedure Code when issued for the first time in a temporary emergency. But the passing of the same order for a second time may not be legal or justified by S. 144 Criminal Procedure Code, if the authorities have sufficient notice of the intended exercise of private rights. What the Madras and Karachi courts have permitted is only a temporary interference with private rights. But it would be incorrect and dangerous to think that the decisions of these courts permit a permanent interference with private rights by the issue of periodical orders under S. 144 Criminal Procedure Code whenever the exercise of the private right is intended. If this be not the correct view then there would be a permanent premium on opposition to private civil rights and there would be an encouragement to those who wish to suppress all opposition to them.

If the view suggested in this article does not meet with judicial approval then there is a clear case for action on the part of the Legislature to amend S. 144 Criminal Procedure Code.

SUMMARY OF ENGLISH CASES

WOLSTANTON LTD., AND ATTORNEY-GENERAL OF DUCHY OF LANCASTER *v.* NEWCASTLE UNDER LYME CORPORATION, (1940) A.C. 860.

Easements—Collateral support—Right by custom to let down the surface of adjoining mine without compensation for damages—Validity.

Practice—Reservation of right to reconsider a decision—Not to be treated as suggesting the decision to be erroneous.

In a claim for an injunction to restrain the defendants from so working their mines as to let down the surface and thus damage the plaintiff's property the defence was that there was both a custom and a right by prescription to work their mine so as to let down the surface without liability to make compensation.

Held, that the custom was unreasonable and therefore unenforceable. *Hilton* v. *Granville*, (1844) 5 Q.B. 701 applied.

Prescription in common law resembled custom and was based on presumption of a lost grant and it is not necessary for those who allege a custom to show how it arose or might have arisen. . ..

Viscount Maugham.—Reservation by a Judge or a Lord of Appeal of the right to reconsider a decision cannot be taken as a statement that he thinks the decision was erroneous.

SEDLEIGH-DENFIELD *v.* ST. JOSEPH'S SOCIETY FOR FOREIGN MISSIONS, 1940 A.C. 880 (H.L.).

Nuisance—Private nuisance—Originating from act of trespasser—Liability of owner or occupier for "continuing" or "adopting" such nuisance.

Where an owner of property continues or adopts a nuisance created by a trespasser on such property, a person affected by it, is entitled to bring an action as and for continuation and adoption of such nuisance against the owner who does not choose to abate it.
Per *Viscount Maugham.*—An owner of land "continues a nuisance, if with a knowledge or presumed knowledge of its existence he fails to take reasonable means to bring it to an end though with ample time to do so. He "adopts" it if he makes any use of the erection, building, "bank or artificial continuance which constitutes the nuisance."

LEWIS *v.* DENYE, 1940 A.C. 921 (H.L.).

Tort—Contributory negligence—Effect—Dangerous machinery—Failure to fence—Laibility for injury.

An infant plaintiff who met with an accident while working on a circular saw in defendant's factory sued for damages on the footing of a breach of statutory duty by the defendant to securely fence the saw. It was found on the evidence that the plaintiff knew that he could have avoided all risks by using the proper apparatus and that he failed to take reasonable care and his omission so to do must have been the effective cause of the accident.

Held, the contributory negligence of the plaintiff disentitles him from succeeding. The question of the legal effect of a breach of statutory regulation was left open.

Decision of the Court of Appeal affirmed.

CANADIAN TRANSPORT CO. *v.* COURT LINE LTD., 1940 A.C. 934 (H.L.).

Charter Party—Charterer to stow under supervision of the captain—Liability for improper stowage—Club rule restraining assignment of shipowner's insurer rights—Effect on charterer's right to get transfer.

Where a charter party provided that "charterers are to load, stow and trim the cargo at their expense under the supervision of the captain" it only entitles the master to interfere with the stowage for the limited purpose of protecting the ship from something which

would interfere with the seaworthiness. The liability for improper stowage is thrown on the charterers and not the shipowners. The charterer cannot claim against the shipowner (who is in a position to obtain indemnity against the liability from his club) a transfer of his rights as the Club Rules prohibited it.

Decision of the Court of Appeal affirmed.

WEAVER *v.* TREADGAR IRON AND COAL CO., LTD., 1940 A.C. 955 (H.L.).

Workmen's Compensation—Accident to workman while boarding a train at a private halt provided by his employer—Accident if one " out of and in the course of employment "—Tests.

After finishing his work at the colliery a workman proposed to return home by train. In order to catch the train he passed directly from the colliery to a private platform provided by the employer which was the only means of access from the colliery to the train and upon which he had no right to be except by virtue of his status as an employee of the colliery. In the press of workmen pushing their way he fell off the platform and his left arm was caught between two railway coaches. The arm had to be amputated above the elbow and the workman was totally disabled. In a claim for compensation,

Held (*Viscount Maugham* dissenting).—It was an accident arising out of and in the course of the employment and the workman was entitled to compensation.

SMITH HOGG & CO. *v.* BLACK SEA, ETC., CO., 1940 A.C. 997 (H.L.).

Shipping—Charter party—Unseaworthy condition of ship—Loss caused by—Owners if entitled to recover general average loss.

Where the dominant cause of the loss was the unseaworthy condition of the ship and that unseaworthiness was due to a lack of care on the part of the owners and the master to exercise due diligence the owners were not entitled to recover general average loss.

Decision of the Court of Appeal in (1939) 2 ALL.E.R. 855 affirmed.

NOKES *v.* DONCASTER COLLIERIES, LTD., 1940 A.C. 1014 (H.L.).

Companies—Companies Act, S. 154—Dissolution—Transfer of property, rights and liabilities to new company—If can include contract of personal service.

Held (*Lord Romer*, dissenting).—An order under the Companies Act, S. 154 transferring to a new company the property, rights and

liabilities of another company which was dissolved under S. 153 of the Act, does not automatically transfer to the new company contracts of personal service with the old company. Such rights are by law not transferable.

Per *Viscount Simon, L.C.*—A right to the service of an employee is not the property of the company.

(1939) 2 K.B. 578 (C.A.) reversed.

Re WILSON, (1940) 1 Ch. 966.

Wills—Legacies and annuities—Abatement—Rights of annuitant.

Where the estate of the testator is insufficient to pay in full the pecuniary legacies and the annuities which he had bequeathed, the annuities have to be valued and the values treated as legacies, and abated proportionately with the pecuniary legacies, and the annuitants are entitled to be paid the abated value of the annuities.

PARSONS *In re*: BARNSDALE AND SMALLMAN *v.* PARSONS, (1940) 1 Ch. 973; 4 All.E.R. 65 (Ch. D.)

Powers—Settlement conferring power to appoint new trustee—Exercise of power by infant—Validity.

A settlement provided *inter alia* that the power of appointing new trustees shall be vested in the settlor during his life and after his death in P his son. After the death of the settlor and the original trustee, P while still an infant purported to appoint his mother to be sole trustee of the settlement in the place of the deceased original trustee. On the question of the validity of the appointment,

Held, that as there was conflict between interest and duty in the position in which the mother was placed the appointment was invalid as prejudicial to the minor's interest.

LAWTON *In re*: LLOYDS BANK LTD. *v.* LONGFLEET ST. MARY'S PAROCHIAL CHURCH COUNCIL, (1940) 1 Ch. 984.

Will—Bequest to trustees of parish church for any purpose permitted by trust deed—Void for uncertainty where there was no trust or trust deed for the parish church.

A bequest was made to the trustees of a parish church to be used in their discretion for any purpose permitted by the trust deed. There being no such trust deed or trustees for the parish church,

Held, that there was no general charitable intention and the gift was void for uncertainty.

(1868) L.R. 6 Eq. 419 Followed.

ORAM *In re*: ORAM *v.* ORAM, (1940) 1 Ch. 1001; 2 All.E.R. 161 (Ch. D.)

Will—Trust for sale and conversion with power to postpone—Residue to be divided into two parts—Proper date for valuation.

A testator after devising various pecuniary legacies bequeathed all his real and personal estate to his trustees upon trust to sell the real estate and to sell, call in and convert into money so much of his personal estate as should not consist of money with a power to postpone, for so long as his trustees should think fit, the sale, calling in and conversion of any part of his real and personal estate. The clause also contained a declaration that the income of his personal estate shall from his death be treated as income. The will further provided that the residuary estate shall be held upon trust to be divided into two parts in such a way that the value of the one exceeded the other by £30,000 and each part was to be held in trust for a named person.

Held that the valuation of the estate was to be made as at the date of the testator's death when the estate was distributable.

GORMAN *v.* BARNARD AND ANOTHER, (1940) 2 K.B. 570 (C.A.).

Tort—False imprisonment—Steward of ship suspected to harbour uncustomed goods—Detention by customs officer—Liability—Customs Consolidation Act, (1876), *S.* 186.

S. 186 of the Customs Consolidation Act made it an offence for any person to knowingly harbour, keep or conceal any uncustomed goods and empowered the customs officer to detain the offender. Where a customs officer detained a ship's steward merely on suspicion that he was harbouring uncustomed goods but not in fact guilty of the offence,

Held [Per *Scott* and *Clauson, L.JJ.*, (*Mackinnon L.J.*, dissenting)]. that the person so detained is entitled to recover damages for false imprisonment. The statute empowers only detention of "offenders" and not suspects.

PARKER (HARRY) LTD. *v.* MASON, (1940) 2 K.B. 590; 4 All.E.R. 199 (C.A.)

Principal and agent—Principal if can recover money paid under illegal contract to agent not applied by him.

Where a principal advances money to his agent to be employed in street betting contrary to law and also for making a fictitious bet on the race course to keep up the odds on a particular horse, the principal cannot recover the money handed to the agent who dishonestly used the money to his own purposes. The court will not

assist either party once the illegality of the transaction is brought to its notice.

REX *v.* INLAND REVENUE COMMISSIONERS *Ex parte* GIBBS (1940) 2 K.B. 615 (C.A.).

Income-tax—Partnership taking an additional partner—Adjustment of assessment.

Where a fresh partnership is constituted by the taking of a new partner,

Held, [Reversing (1940) 2 K.B. 242] that the first partnership had not ceased to carry on a business and had not been succeeded therein by another and was assessable accordingly.

WOOD *v.* LONDON COUNTY COUNCIL, (1940) 2 K.B. 642; 4 All. E.R. 149.

Factories Act (1937)—*S.* 151, *Sub-Ss.* (1) (*a*) (*b*), 9—*Kitchen in a hospital run by public authority—If "factory"—Injury to kitchen maid while mincing meat—Failure to make dangerous machinery safe—Liability.*

Plaintiff, a kitchen maid in a hospital kitchen, was injured while mincing meat by reason of her hand being caught in the machine which was not safely fenced. In an action for damages,

Held, that the kitchen was a "factory" within the meaning of S. 151, sub-s. (1) of the Factories Act and the defendant ought to have safely fenced any dangerous machinery therein. Where premises belong to or are in the occupation of a public authority it is not necessary that the work carried on thereat should be carried on by way of trade or for purposes of gain.

COLLIER *v.* SUNDAY REFEREE PUBLISHING CO. LTD., (1940) 2 K.B. 647; 4 All.E.R. 234.

Contract of service for a term—Sale of business before expiry of term and vendee not requiring the services—Claim for damages.

Plaintiff entered into a contract of service with the defendants by which he was appointed sub-editor of a specific paper for a period of two years from 1-9-1938 to 31-8-1940. On 11-6-1939 the paper was sold to another company which dispensed with the services of the plaintiff. In a claim for damages for breach of contract,

Held that the sale of the newspaper operated as an improper dismissal of the plaintiff and that the plaintiff was entitled to damages upto the date when the broken contract would have expired. Normally a servant, so long as he continued to be paid the stipulated salary can have no legal complaint notwithstanding that owing to the action of the employer he was left with nothing to do.

Only in certain exceptional cases there is an obligation to provide work.

FRIIS *v.* PARAMOUNT BAGWASH CO., LTD. (No. 2), (1940) 2 K.B. 654; 4 All.E.R. 72.

Practice—County Court—Examination of witness on commission—Costs—County Court rules, O. 48, r. 1.

In an action in a County Court no order was made as to costs of taking evidence of the defence witnesses on commission. On the ultimate dismissal of the action,

Held, that the defendant was entitled to the costs incurred by him in making an interlocutory application to the County Court in respect of the examination of his witnesses before an examiner and the costs of examining the witnesses.

WILLIAMSON *v.* THORNYCROFT AND CO., (1940) 2 K.B. 658.

Fatal Accidents Act—Negligence causing death—Widow of deceased dying before trial of action for damages—Effect on assessment of damages.

The courts in doing justice on questions of damages are entitled to take note of the events which have happened subsequent to the date at which the cause of action accrued as throwing light upon the reality of the case. Accordingly where in a suit under Lord Campbell's Act the widow of the deceased dies before trial the court cannot shut its eyes to the fact that one dependent had only a short tenure of life before her dependence was brought to an end. A comparatively small amount ought to be allowed for such deceased dependent.

MANSER *v.* MANSER, (1940) P. 224; 4 All.E.R. 238.

Divorce—Wife's petition for divorce based on presumption of husband's death—Decree nisi*—Husband found to be alive—Decree to be rescinded.*

On a wife's petition for divorce a decree *nisi* was passed on the presumption that the husband was dead. On an intervention by the King's Proctor for rescinding the decree on the ground that the husband was alive, it was contended for the petitioner that the presumption of death was a ground for divorce and the fact of death was not material.

Held, that there was good cause for rescinding the *decree nisi* and not to make it absolute. The proceedings cannot continue on the footing of the presumption of death of an individual who is admittedly alive.

JOTTINGS AND CUTTINGS

UNVEILING OF SIR P. S. SIVASWAMI AIYAR'S PORTRAIT.

It was a very pleasant function that was performed by Sir Lionel Leach, Chief Justice, when he unveiled on Friday, the 14th March, 1941, a portrait of Sir P. S. Sivaswami Aiyar, K.C.S.I., C.I.E., LL.D., at the premises of the Madras Advocates' Association.

In requesting the learned Chief Justice to unveil the portrait, Sir Alladi Krishnaswami Aiyar, the President of the Association said :-

"In requesting Your Lordship to unveil the portrait of an eminent lawyer and distinguished son of India I feel I shall be failing in my duty if I do not give expression to my feelings of esteem and regard for Sir Sivaswami Aiyar. When I joined the Bar in 1907, he was one of the prominent leaders and shortly afterwards was appointed Advocate-General. I had the privilege of instructing him in a few cases both here and in the mofussil and of even opposing him in one or two cases in the absence of my learned leader, the late P. R. Sundara Aiyar, and I can speak with some personal knowledge about Sir Sivaswami Aiyar's work at the Bar. His advocacy was marked by the same characteristics which singled him out in the different spheres of his varied public activity—a slow and deliberate manner, deep learning, a punctilious attention to the use of the correct expression, a thoroughness of preparation, and an unwillingness to be hustled into making quick and seemingly clever repartees or replies. He was loath to leave one point and take to another on an interrogation from the Bench. The steering must be along a planned route. A too quick Bench bent on a speedy disposal of a cause could not get very much out of him and he would resent an interruption from the opposite side calculated to interfere with the even tenor of his arguments.

He was appointed a Member of the Executive Council in the year 1912 and filled that high office until 1917. His career as a Member of the Council was marked by a high sense of public duty, and a thorough study of the knotty problems of administration, even if the study occasionally led to a certain delay in disposal which might not be quite to the liking of the routine administrator.

When he retired from the office of Executive Councillor, instead of yielding to the temptation of returning to the profession, of which he was such a distinguished ornament, he decided to devote himself to unostentatious public service, giving the benefit of his sage counsel and advice whenever the interests of the country demanded it, and to the study of the classics and literature. As a nominated member of the Indian Legislative Assembly he was regarded almost as an authority on military matters and was listened to with respect and attention by every section of the house. "The speech is the man" is

well illustrated in his public utterances. Every word of his is weighed ; there is no exaggerated emphasis on any point and there is no excursion into fields which have not been thoroughly explored. His apparently faltering manner on certain occasions is the best index of his most careful deliberation and his anxiety to use the right word appropriate to the occasion. Even at this age, whenever he is in doubt regarding the pronunciation of a word or the particular sense of any word or expression he takes care to consult the latest edition of the Oxford dictionary.

While deeply learned in the law, law is but a part of his attainments. He enjoys the companionship of the great masters of literature, English and Oriental. Hardly a day passes, I am told, when he does not read some passages of the Ramayana or the Maha Bharatha or Bhagavatha. He lives up to the Upanishadic ideal that all the great virtues of man—*tapas*, *rita*, etc.,—are promoted by *swadhyaya*, *i.e.*, perpetual study and devotion to culture. Even now he leads a most regular life. At a particular hour he is enjoying his walks ; at another hour he is in his prayer and is having his religious exercises, and at another hour he is at his study. His daily life is punctuated with an unexampled precision. There is no institution with which he is connected in regard to which he does not give his individual and personal attention. No detail, whether it is a matter connected with the arrangement of a class routine in the National Girl's School or with a building plan or it may even be the arrangement of seats in regard to a dinner, would escape his attention.

In the case of many people the mind ceases to grow after a particular age and maturity of judgment may be another name for sterility. He is the example of a true conservative wedded to progress. His nature, while deeply rooted in the traditions of Ancient India, is ever responsive to new impulses and currents of thought. It is interesting to note that his world tour coincided with his retirement from office. He was anxious to quench the thirst for seeing all the places and institutions which came within his wide reading. Few people know the extent of his public benefactions, and in his charities he has truly acted on the religious principle of the right hand not knowing what the left hand doth. While it is not easy to persuade him to give for causes in which he has no faith, it is well known that he has practically devoted all his wealth to public uses. The Thirukattupalli High School and the Mylapore Girls' School are standing examples of his generosity, and he never ceases to help Pundits of undoubted and genuine scholarship.

He takes a keen interest in education ; he was Vice-Chancellor both of the Madras and Benares Universities. He has almost a parental affection for the pupils that came under his wardship,

whether to-day a particular pupil occupies the position of a Judge in the Highest Court, whether he is occupying the position of a doyen at the Bar or whether the pupil is occupying a humbler position. By having this portrait of his on these walls, the Association is honouring itself. May God grant him a still longer life and may the profession continue to have the benefit of his sage counsel and advice.

With these few words I request Your Lordship to unveil his portrait."

The Hon. Sir Lionel Leach, the Chief Justice, in unveiling the portrait said:

"It has been my happy duty on a number of occasions to unveil either in this room or in the central corridor of the High Court, the portraits of distinguished members of the legal profession. It is my happy duty to-day to unveil the portrait of yet another distinguished member of our profession, the portrait of Sir P. S. Sivaswami Aiyar. The Madras Bar has produced many great men but none can be deemed to be more deserving of a niche in the hall of fame than Sir Sivaswami.

Sir Sivaswami was born on the 7th February, 1864 and was enrolled as a High Court Vakil before some of us had crawled out of the cradle and before many of you had even been thought of. His enrolment took place in 1885, when he was only 21 years of age. His career at the Bar was such that I can well imagine that it was a source of universal satisfaction when in 1907 he was appointed to the office of the Advocate-General and thus became the leader of the Madras Bar. Unfortunately, Sir Sivaswami had given up practice before I came to Madras, but I met him very soon after my arrival and I quickly understood why he is held in such universal esteem.

In a life of Lord Cave, who as you know became the Lord Chancellor of England, the following is said of him:—'It was accuracy of thought combined with great carefulness of speech that made Cave quietly successful. He gave the impression that his great anxiety was to avoid overstating his case and to win success for it simply on its intrinsic merits.'

From what I have gathered about his career at the Bar these words can be applied with equal truth to Sir Sivaswami. In spite of his quiet and retiring nature he was successful and in winning success he gained the confidence, respect and affection of the whole Bar, and the Bar is the most critical of all professions.

Throughout his career Sir Sivaswami has taken a great interest and played an important part in politics. He sat in the Madras Legislative Council from 1904 to 1907 as the representative

of the University of Madras. He was the first Indian to occupy that position. From 1912 to 1917 he was a Member of the Executive Council of this Presidency and it was during that period that His Majesty conferred upon him the honour of Knight Commander of the Order of the Star of India in recognition of his public work. He was the President of the second session of the National Liberal Federation held at Calcutta in 1919, and of the ninth session held at Akola in 1926. In 1924 he was nominated a member of the Indian Legislative Assembly.

He has always been of the Liberal school of thought. I am sure that I can say with the approval of you all, and without running the risk of being accused of entering into politics myself, that India owes a great deal to Sir Sivaswami for the part he has played and is still playing in the political field. The advice and help of one of such high principles and possessing such a sense of fairness and such a knowledge of affairs as Sir Sivaswami has, can only be of benefit to his fellow countrymen. It was the possession of these qualities which led to his being appointed a member of the Indian Delegation at the third session of the Assembly of the League of Nations at Geneva in 1922.

In a recent speech, Mr. T. R. Venkatarama Sastriar remarked that Sir Sivaswami's politics may be in the judgment of the present generation rather old-fashioned and blind to certain broad facts which have come into existence. I cannot imagine Sir Sivaswami being blind to the realities of any situation and to be old-fashioned does not mean to be wrong.

The following quotation from "As You Like It" may not be out of place here:—

> "O good old man, how well in thee appears
> The constant service of the antique world,
> When service sweat for duty, not for meed!
> Thou art not for the fashion of these times,
> Where none will sweat but for promotion;
> And having that, do choke their service up
> Even with the having: it is not so with thee."

Promotion for Sir Sivaswami has never meant a slackening in his endeavours to serve his fellowmen.

His services in the administration of justice and in the political field do not make up the full account of what his countrymen owe to Sir Sivaswami. He has also played a great part in the sphere of education. In his early days he was a Professor of the Madras Law College. In the fulness of time he became the Vice-Chancellor of the University of Madras, the Vice-Chancellor of the Benares Hindu University and the President of the Sanskrit College

Committee, and he has added to his services to education by founding a High School.

Sir Sivaswami has now passed his 77th year, but in spite of his advanced years, he is active both in mind and body. We have all seen him when out on his daily walk and what an inspiration it is! Few of his age are blessed with the same fund of energy, mental and physical, as he possessed, but we can all profit by his example.

To achieve true success, ability and capacity for hard work must be coupled with integrity and a high sense of duty. Sir Sivaswami has combined all these qualities, and the result is that he is held in the greatest respect by every class and by every community. Men of his type are only too rare and it must be the fervent prayer of all that he may be with us for many years more.

The Association owes a deep debt of gratitude to Mr. Venkatarama Sastriar for the presentation of the portrait. I will now proceed to perform the pleasant duty which has fallen to my lot of unveiling the portrait of the Grand Old Man of Madras".

Law and Lawyers in Literature.—Readers of Sir Walter Scott's great novel, "Guy Mannering"—one of the best of the series—may recall that when Colonel Mannering went to consult Counsellor Playdell in Edinburgh he was shown into a room hung with a portrait or two by Jamieson, the Caledonion Vandyke, and surrounded with books, the best editions of the best authors, and in particular an admirable collection of the classics, as to which their fortunate owner said: "These are my tools of trade. A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect." Happily, law and literature have time and again been felicitously linked together, and even law treatises, usually reputed by the public as the acme of aridity, have been rendered literature in the real sense by the lucidity and even charm of their language as witness the writings of such distinguished lawyers as Sir Henry Maine, F. W. Maitland, and others.—*L.T.*, *1940*, *p. 260.*

Jocular References.—In "Love a la Mode," Charles Macklin gaily announced that "the law is a sort of hocus-pocus science, that smiles in your face while it picks your pocket; and the glorious uncertainty of it is of more use to the professors than the justice of it." In another and more recent collection of quotations, that by Sir Gurney Benham, is a short section headed "Forensic," which starts off with the cheerful statement that "the law of England is the greatest grievance of the nation, very expensive and dilatory," Bishop

Burnet being the author. Thus, law is represented by his dictum that "corporations have neither bodies to be punished nor souls to be damned: they therefore do as they like." Lord Westbury, the author of many caustic sayings, is represented by his description of a witness from the College of Arms as "a silly old man who did not understand even his silly old trade." The authorship of this, however, has also been fathered on Lord Chesterfield and Whately. More practical was Westbury's injunction to his coachman, when the horses got out of hand, "drive into something cheap."
L.T. 1940, p. 260.

Retired Judges and Further Service.—Occasionally, as we know, those who have retired from the Bench have responded to the call for further service, not only in presiding over public inquiries, but also in renewing their judicial work for which they were made eligible by certain comparatively recent statutes. Among those of the past who returned to the courts after having resigned was Lord Darling, who on two occasions came back to the courts to assist in clearing off arrears and seemed to enjoy having again to appear in his judicial robes. A more recent instance, however, of a retired judge returning to active service was seen recently in the House of Lords, which has been engaged in considering the question of damages awarded in respect of the death of a very young child by accident. So important did the House regard the question that instead of being constituted of five law lords as is the normal number sitting, it was decided that the appeal should be heard by seven, and one of the seven, it was interesting to note, was Lord Roche, who was a Lord of Appeal from 1935 to 1938, but who now came back to assist in the solution of the point in dispute. In his case no statutory authority was needed to entitle him to sit after having resigned, for, as a peer who has held high judicial office, he is entitled to sit if he thinks fit so to do. His resumption of work is, however, another instance of the readiness of our public men to share in work for which they have special qualifications.—*S.J., 1940, p. 637.*

Indexes and Their utility.—In a certain classic work it will be remembered that Sancho Panza invoked blessings on the head of him who invented sleep. Many of us would fain do the like for him who invented the index, that invaluable adjunct and key to the contents of a book, particularly if the book is a large one. Isaac Disraeli, the father of the better known Benjamin, said that he venerated the inventor of indexes; indeed he even went so far as to say that he knew not to whom to yield the preference—to Hippocrates, who was the first great anatomiser of the human body, or to

that unknown labourer in literature who first laid open the nerves and arteries of a book. As another enthusiast declared, "an ideal indexer needs high qualifications; but unlike the poet he is not born but made." So important did yet another regard the index that he went so far as to declare that any work which from the nature of its subject-matter ought to be provided with an index, but was issued without one should be deprived of the benefit of the Copyright Acts. Till now, however, Parliament has not seen fit to enact this drastic rule. A further tribute to the index, and a striking one, is furnished by the fact that some editions of Scott's novels are equipped with indexes which the present writer has found of great utility every now and again.—*L.T., 1940, p. 295.*

BOOK REVIEWS

Sohoni's Code of Criminal Procedure, 14th Edition, by W. T. Sundararajan, Advocate, Madras High Court, Published by The New Book Company, 188-190 Hornby Road, Bombay: 1941, 1389 pages. Price Rs. 20.

Sohoni's treatise holds a prominent place among the Commentaries on the Criminal Procedure Code. The present edition has revised and brought up to 1941 the text as well as the case-law bearing on the code. Important decisions such as *Pakala Narayanaswami* v. *Emperor* I.L.R. 18 Pat. 234 (P.C.) on the construction of S. 162, Criminal Procedure Code, and its reaction on S. 27 of the Evidence Act and *Mathen* v. *District Magistrate, Trivandrum*, I.L.R. 1939 Mad. 744 (P.C.) holding that in any of the cases covered by S. 491 Criminal Procedure Code, the common law writ of *habeas corpus* cannot be issued have all been appropriately noticed. A distinctive feature of the treatise is the inclusion of the reports of the Racial Distinctions Committee, 1922, and the Select Committee on the Bill to amend the Criminal Procedure Code, 1922. The texts of the Charter Act and the Letters Patent, the Cattle Trespass Act, 1871, the Coroners Act, 1871, the Criminal Law (Amendment) Act, 1908, the European Vagrancy Act, 1874, the Indian Extradition Act, 1903, the Indian Oaths Act, 1873, the Police Act, 1861, the Police Act, 1888, the Prisoners Act, 1900, the Prisons Act, 1894, the Reformatory Schools Act, 1897, and the Whipping Act, 1909, together with useful notes thereon are set out in appendices. These are features that add considerably to the utility of the book. A lead on certain points might have added to the completeness of the work, such as for instance, on the question whether S. 439 (6) should be read subject to S. 423 (2), or whether in view of S. 497 (5) it will be competent to a Magistrate having seisin of a case to cancel the bail

granted to an accused by another Magistrate who had seisin of the case at an earlier stage, etc.

The present edition fully sustains the reputation of its predecessors. The notes given under each section are accurate and adequate. We have great pleasure in welcoming the publication which is sure to be of great help to all practising lawyers.

THE INDIAN SALE OF GOODS ACT, 1930 by Om Prakash Aggarwala, M.A., with a Foreword by Sir B. L. Mitter, Published by the Lahore Law Depot, Kachery Road, Lahore: 1941: 731 pages. Price Rs. 7-8-0.

A knowledge of the law relating to sale of goods is becoming increasingly necessary in view of the growth of commerce apace. The Indian Sale of Goods Act, 1930 which superseded the provisions of Ch. VII of the Indian Contract Act is based on the corresponding English Act. A good commentary therefore of the Indian Act explaining its various sections and indicating the points where the Indian law diverges from the English law together with the reasons therefor is certainly to be desired. Mr. Om Prakash has endeavoured in this book to supply that want. He has given an analysis of the sections under appropriate heads and sub-heads. There are as many as nine appendices setting out the English Sale of Goods Act, 1893, the Indian Contract Act, 1872, Ch. VII, the English Sale of Goods Act as adopted by some of the Colonies, the Report of the Special Committee, the Report of the Select Committe, the Indian Bills of Lading Act, 1856 etc., and these are bound to prove greatly helpful particularly to those engaged in business. The citation of cases, English and Indian, is fairly full and the notes to the sections are dependable. The book is moderately priced and will be useful to lawyers as well as merchants.

THE ARBITRATION ACT, 1940, by N. L. Gupta, with a Foreword by the Hon'ble Mr. Justice Braund, published by the Law Publishing House, 33 Sheocharan Lal Road, Allahabad: 1940: 306 pages. Price Rs. 5.

The modern law of arbitration is by no means simple and arbitrators as well as those that advice or seek arbitration should have a more than passing acquaintance with the law on that subject. The Indian Arbitration Act, 1940 contains that law mainly and the value of a reliable commentary on the several sections of the Act cannot be exaggerated. The author who is a member of the U. P. Civil Service has in this book explained the several provisions of the Act

in the light of decided cases and the Reports of the Select Committee and the Civil Justice Committee of 1925. The reproduction of these reports and the texts of the English Arbitration Acts of 1889 and 1934 and the Administration of Justice Act, 1920 in the appendices to the book is a commendable feature of the book. The commentaries on the sections are thorough and the citation of cases judicious, though one may wish that decisions like those in A.I.R. 1937 P.C. 274 regarding the effect of a reference the true import of which had not been understood by one of the parties thereto, and in I.L.R. (1938) 2 Cal. 349, regarding the finality of a reference on a specific question of law, had also come in for notice. The book is sure to prove a useful addition to the library of every lawyer.

THE LAW OF HUNDIS AND NEGOTIABLE INSTRUMENTS, by Chiranjivi Lal Agarwal, M.A., LL.B., 4th edition, 1941. Published by the University Book Agency, Kacheri Road, Lahore: 480 pages. Price Rs. 5-8-0.

The law relating to Negotiable Instruments is a fascinating subject of study and a knowledge thereof is almost indispensable to merchants as well as to lawyers. Mr. Agarwal as the University Lecturer in Commercial Law at the College of Commerce, Lahore, is specially fitted to write on the subject and that he has been able to place the fourth edition of his book on the market within a decade of the publication of the first edition testifies to the popularity of his book.

In addition to giving the text of the Negotiable Instruments Act and providing comments on its sections, the author has set out the texts of the English Bills of Exchange Act and certain other enactments. The principles of the English Law Merchant have been referred to wherever necessary for purposes of comparison and the law relating to Hundis has been separately expounded. On the question, whether a Provincial Legislature can while legislating in respect of money-lenders and money-lending enact laws affecting the rate of interest on Negotiable Instruments, the author merely remarks that " the question is not free from difficulty and we have to wait until we get an authoritative pronouncement of the Federal Court on the matter." It would surely have been more helpful, particularly when the question had been propounded, if the author had discussed the matter and given his own conclusions. Curiously enough there is no index of cases, nor does the citation of authorities follow any uniform principle, some citations giving the names of the parties as well as the reports while others mention the reports only. The book contains on the whole an excellent exposition of the subject and we can commend it to both lawyers and law students.

LAW RELATING TO COMPANY DIRECTORS IN INDIA, by H. R. Mehrotra, G.D.A., published by the Progressive Publishing Co., P. 35-B. Central Avenue, Calcutta: 1940: 274 pages. Price Rs. 8.

The book is almost a pioneer in the field in so far as it is specially written for Directors of Companies in India. It expounds the rights, powers, duties and liabilities of company directors as set forth in the Indian Companies Act, 1913 and the decisions of courts. The exposition is in a form calculated to appeal to businessmen and is couched in simple and intelligible phraseology. The author's classification of directors into Born Directors, Guinea-pig Directors, Fee Directors, Exalted Directors, and Real or Practical Directors is very apt. Wherever no rule dealing directly with a matter is to be found the author has not hesitated to state what the rule should be. Inclusion of such decisions as that in *Premila Devi* v. *People's Bank of Northern India*, [A.I.R. 1938 P.C. 284] explaining the circumstances under which alone ratification by the share-holders of an act *ultra vires* the directors but *intra vires* the company will be valid would have made the exposition more full. We are sure that the book will prove a practical and dependable handbook not merely for directors, managing agents and other company officers but to lawyers as well.

HOW TO FORM A COMPANY, by H. R. Mehrotra, G.D.A., published by the Progressive Publishing Co., Calcutta: 1940: 160 pages. Price Rs. 3.

In this book the author states the law and practice relating to the formation of companies under the provisions of the Indian Companies Act, 1913. He takes us step by step from the first glimmerings of the idea of promoting a company down to its actual incorporation by the issue of the necessary certificate. The principles are stated in a simple style eschewing technical jargon as far as possible and in a practical form. The book is bound to prove a useful guide to those contemplating the formation of companies.

THE LAW AND PRACTICE OF EXCESS PROFITS TAX IN INDIA, by Iyer and Manchanda, published by the Indian Law Agencies, Law Publishers, Krishna Nagar, Lahore: 1941: Price Rs. 5.

The book is intended to be an exhaustive commentary on the Excess Profits Act (XV of 1940). The subject is covered in ten chapters. The rules framed under the Act and the Forms prescribed are given as appendices. The enactment is born of war conditions and seeks to tax excess profits attributable to such conditions. The authors are already familiar to the legal public in connection with

their work on the Indian Income-tax Act and the book under review is intended to serve as a companion volume thereto. The provisions of the Excess Profits Tax Act are by no means simple to understand and the precise scope of the exemptions contemplated, deductions allowable in respect of depreciation, obsoloscence etc., of plants, machinery and other assets, the valuation and realisation of stocks bought at an inflated value are all matters which are sure to give rise to considerable difficulty as regards their practical application. The notes provided by the authors as well as the " practical examples " afforded will no doubt be helpful in this connection. Leading decisions, Indian and English, relating to the construction of terms and provisions in the Income-tax and other Acts have been cited wherever relevant to facilitate an understanding of similar terms and provisions in the Excess Profits Tax Act. We have great pleasure in commending the book to the legal public.

THE MADRAS AGRICULTURISTS' RELIEF ACT (IV OF 1938), published by Messers. Ramaswami Aiyangar and M. Narasimhachariar, Advocates, Chittoor. Price Re.1-8-0.

Though the book is coming a little late into the field after two years of the Act's coming into force, and after a number of small books have been published, we have no doubt that this book will be received with due respect and find a good sale in the market. The two advocates who have collaborated to bring out this book have spared no pains to collect all the cases decided under the Act and to group them under appropriate headings and one special feature is that in many cases the facts of the case have been fully set out in detail and relevant passages of the judgment extracted , so that it becomes easy for the reader to understand the case without searching for the report. A further feature of the book is that the authors have given the references to all the reports where a case is reported, instead of confining it to one report.

We hope that the book will be given a very good reception and that the first edition will soon be sold out, so that we may expect a second edition early with the case-law up-to-date again.

THE INDIAN SUCCESSION ACT by Nrisinhadas Basu (2nd Edition, 1941). Published by The Eastern Law House, 15, College Square, Calcutta. Price Rs. 12.

Mr. Basu's book on the Indian Succession Act is one of the leading treatises on that subject. The present edition has incorporated the latest amendments to the Act and the result of the judi-

cial decisions, English and Indian, down to July, 1940. The Succession Act is mainly based upon the English law of testamentary succession relating to personal property and it is with reference to that background that the provisions of the Act will have to be understood. To facilitate such understanding a reference to English decisions becomes essential except on matters where the Indian Act has marked a departure from the principles of English law. The author has therefore done well not merely in drawing pointed attention to the differences between English and Indian law wherever they exist but also in making profuse citations from English cases elucidating the scope of the various rules. In view of the comprehensive character of the book we wish that place had been found therein to include references to decisions like those in *Bahu Rani* v. *Rajender Baksh*, (1933) L.R. 60 I.A. 95 (P.C.) on joint tenancy among Hindus, and in *In the goods of McCankie*, (1940) 1 M.L.J. 264 on the scope of S. 241 of the Act.

The author has endeavoured to make the book self-contained and has set out the provisions in other enactments affecting succession. The inclusion of Model Forms and the Rules framed by the several High Courts constitute a highly helpful feature of the book. The notes provided under the sections are lucid and well arranged. We have great pleasure in welcoming the publication.

THE JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW, Third Series, Vol. XXII, Part IV.

To persons living far away from the theatre of war and the grim havoc that it is working from day to day it will be rather difficult to appreciate the conditions under which a Journal like the one under review comes to be published. The building in the Temple in which the Society of Comparative Legislation had chambers has been destroyed owing to enemy action and a portion of the records lost; nevertheless every effort has been made to bring out the November number of the Society's Journal as usual. The reputation which the Journal enjoys among the legal literature of the British Empire is high and well-known. The Journal constitutes almost the only bond of union in the realm of law between the members of the British Commonwealth and the U. S. A. and deals with a wide range of subjects covering business affairs, social questions and legal matters. It is therefore a matter for gratification that the Society's Journal continues to be published as before.

THE
MADRAS LAW JOURNAL

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MR. JUSTICE PANDRANG ROW'S RETIREMENT.

Mr. Justice Pandrang Row will be retiring from service during the summer recess of the High Court. He has been a member of the Bench for well-nigh seven years and a half and during that period has won the appreciation of the profession as a very able and conscientious Judge. Gifted with an intuition, swift and searching, and a power of analysis, keen and incisive, he was easily able to get to the core of a case, however complicated the facts, or however subtle the points of law raised, might be; and he was equally at home both in civil and criminal work. His attitude on the Bench was at the beginning somewhat disconcerting to the practitioners who had to appear before him, by reason of the catechetical method he adopted, often from the very opening of the case, and by reason of the rather brusque manner in which he not infrequently expressed himself. The first impression, perhaps not unnaturally, was that the practitioners were cornered, confuted, and overthrown in argument and humiliated, but it was soon realised that it was mere external manner, the result of intellectual alertness and vigour trained in methods of controversy, that the initial instinct of challenge did not persist or prevail over his sound perception of things and that to the end he kept an open and receptive mind. He had no hesitation to brush aside technical considerations to ensure justice being done. In fact it might be said that his ideal was that justice should not merely be done but should also seem to be done. His work as a Judge has been characterised by thoroughness, independence and sound learning and by his retirement a distinctive personality and a sound Judge will be lost to the High Court.

THE LAW OF EVIDENCE IN ANCIENT INDIA

BY

N. Phalalochana Rao, *Advocate*.

A commentator on the Indian Evidence Act, has in the introduction to his book stated, "neither Manu and his Brahminical commentators nor Muhamadan Moulvis laid down any definite rules regarding the admission and rejection of evidence." The object of this article is to demonstrate that in the Hindu jurisprudence the law of evidence has been analytically and succinctly dealt with by Manu, Narada, Yajnavalkya, and other Hindu jurists and exegetists.

Yagnavalkya classifies प्रमाणं (evidence) thus:—

प्रमाणं लिखितं भुक्तिः साक्षिणश्चेति कीर्तितम् ।
एषामन्यतमाभावे दिव्यान्यतममुच्यते ॥[1]

प्रमाणं *i.e.* Evidence or the *factum probans* is mainly of two kinds. (1) मानुष *i.e.* human (2) दिव्य *i.e.* divine; when the former is available the latter should not be invoked.

मनुष्यप्रमाणं or human evidence is again of three kinds, (1) लिखितं documentary evidence, (2) साक्षिण: witnesses (oral evidence), (3) भुक्तिः possession or enjoyment. Narada says

प्रमाणानि प्रमाणस्थैः परिकल्प्यानि यत्नतः ।

—Narada, I, 68.

—as far as possible facts should be proved by primary evidence only. As to the probative force of the aforesaid three kinds of evidence Narada says:

लिखितं बलवन्नित्यं जीवन्तश्चैव साक्षिणः ।
कालातिहरणाद्भुक्तिरिति शास्त्रेषु निश्चयः ॥

—documentary evidence is always strong; oral evidence is good only so long as the witnesses are alive; and possession or enjoyment gathers strength by lapse of time; thus is laid down in Sastras.

लिखितं or documentary evidence may be looked at first. It is of two kinds.

(1) शासनं Statutory or Public documents, and (2) चीरकं or जानपदं Private documents.

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1. *C. F.*:—"लिखितं साक्षिणो भुक्तिः......।"

—Narada, I, 65.

Narada says thus about private documents:

लेख्यं तु द्विविधं ज्ञेयं स्वहस्तान्यकृतं तथा ।
असाक्षिमत्साक्षिमच्च सिद्धिर्देशस्थितेस्तयोः ॥

—Narada, 135.

—(Private) documents are of two kinds (1) स्वहस्तकृत *i.e.* documents written or executed by the person concerned, and (2) अन्यहस्तकृत documents written or executed by others. Again they may be either (*a*) साक्षिमत् attested, or (*b*) असाक्षिमत् unattested. The validity or invalidity, admissibility or inadmissibility of attested and unattested documents depends upon the practice obtaining in that particular part of the country.

सिद्धिर्देशस्थितेस्तयोः ।

If a document is not contrary to the practices of that part of the country and if there are no corrections, alterations or erasures etc., it may be admitted in evidence.

देशाचारविरुद्धं यद् व्यक्ताधिविधिलक्षणम् ।
तत्प्रमाणं स्मृतं लेख्यमविलुप्तक्रमाक्षरम् ॥

—Narada, 136.

Admissions :—A document written or executed by the person concerned is not evidence in his favour as it is only a self-serving document, but अन्यहस्तकृत documents executed by others are good evidence against him. Also स्वहस्तकृत *i.e.* self-written or self-executed documents will be evidence against the executant as admissions, even when they are not attested by witnesses though required by law to be so attested, except in cases where a document is proved to have been executed under coercion, undue influence, fear etc., or when the executant is drunk, or engaged in litigation or is a woman or child.

विनापि साक्षिभिर्लेख्यं स्वहस्तलिखितं तु यत् ।
तत् प्रमाणं स्मृतं लेख्यं बलोपाधिकृतादृते ॥
मत्ताभियुक्तस्त्रीबालबलात्कारकृतं च यत् ।
तदप्रमाणं करणं भीतोपाधिकृतं तथा ॥

—Narada, 137.

Secondary Evidence :—Regarding secondary evidence the Smritikars say as follows:

लेख्ये देशान्तरस्थे च दग्धे दुर्लिखिते हृते ।
सतस्तत्कालकरणमसतो द्रष्टृदर्शनम् ॥
छिन्नभिन्नहृतोन्मृष्टनष्टदुर्लिखितेषु च ।
कर्तव्यमन्यल्लेख्यं स्यादेष लेख्यविधिस्स्मृतः ॥

—Narada, 142, 146.

देशान्तरस्थे दुर्लेख्ये नष्टोन्मृष्टे हृते तथा ।
भिन्ने दग्धेऽथवा छिन्ने लेख्यमन्यत्तु कारयेत् ॥

—Yajnavalkya.

A copy of a document can be prepared and it can be admitted in evidence in the following cases: (1) when the document is in a foreign country (2) when it is burnt (3) when it is illegible (4) when it is stolen (5) when both parties consent (6) when it is torn (7) when it is worn out, and (8) when it is lost.

लिखितं लिखितेनैव साक्षिमत् साक्षिभिर्हरेत् ।
साक्षिभ्यो लिखितं श्रेयो लिखितान्न तु साक्षिणः ॥

—Narada, 145.

In all other cases where there are the originals, they should be proved by primary evidence alone; if the document is one attested by witnesses it can be proved by the oral evidence of those witnesses—Documentary evidence is better than oral evidence, but sometimes oral evidence is superior to documentary evidence, for example in the case of *benami transactions*.

लेख्यं यच्चान्यनामाङ्कं हेत्वन्तरकृतं भवेत् ।
विप्रत्यये परीक्ष्यं तत् सम्बन्धागमहेतुभिः ॥

—Narada, 144.

—When a document is taken or (appears) in the name of another person for some reason or other, on account of extreme confidence (विप्रत्यय) in that person, that can be proved by the संबन्ध relationship (between the parties) आगम by title (of real owner), and हेतु motive for the transaction. That is to say oral evidence is admissible in such cases, to prove the real nature of the documents.

Comparison of handwriting: Forgery. (भूतकृत) The Smritis declare:

यत्र स्यात् संशयो लेख्ये भूताभूतकृते क्वचित् ।
तत् स्वहस्तक्रियाचिह्नयुक्तिप्राप्तिभिरुद्धरेत् ॥

—Narada, 143.

संदिग्धलेख्यसिद्धिस्स्यात् स्वहस्तलिखितादिभिः ।
युक्ति-प्राप्ति-क्रिया-चिह्न-संबन्धा-ऽऽगमहेतुभिः ॥

—Yagnavalkya.

—when there is suspicion about the execution or genuineness of a document or when the document is attacked as a forgery it can be proved by any of the following methods:

(1) by comparison with the admitted handwriting of the person, (2) by tact, (3) by guess or conjecture, (4) by judicial investigation, (5) by indications, (6) by context, (7) by motive, reason etc.

Public documents (शासन) *and Judicial Notice*: On this point it is stated:

राज्ञस्स्वहस्तसंयुक्तं स्वमुद्राचिह्नितं तथा ।
राजकीयं स्मृतं लेख्यं सर्वेष्वर्थेषु साक्षिमत् ॥

—documents bearing the signature or seal of the King are called Royal documents (public documents) and they are evidence in all actions:—

(2) साक्षिण: *Witnesses or Oral Evidence.* According to Narada,

संदिग्धेषु तु कार्येषु द्वयोर्विवदमानयोः ।
दृष्टश्रुतानुभूतत्वात् साक्षिभ्यो व्यक्तिदर्शनम् ॥

—Narada, 147.

—the matters in dispute between the parties can be proved by witnesses who have actually seen, heard, or perceived by any other sense. Bhavaswamy, the commentator on the Institutes of Narada explains this verse thus:

"दृष्टं चक्षुर्द्वारेण ज्ञातं, श्रुतं श्रोत्रद्वारेण, अनुभूतं लिङ्गादिनिमित्तं स्वसंवेद्यज्ञानं अन्यथा संभवविलोपत्राभिघातादिनैवमेव न अन्यथा परिच्छेदज्ञानम् । प्रत्यक्षानुमानागमैः यस्मादर्थः परिच्छिन्नः तस्मात्तेभ्यो व्यक्तिदर्शनमुपपद्यते । यस्मात् सर्वपरिच्छेदहेतवः प्रत्यक्षानुमानागमाः, तैः परिच्छिन्नत्वात् उपपन्नं तेषां प्रामाण्यमिति ।"

—facts which are actually or directly seen with eyes, heard with ears, or perceived by any other sense must be spoken to by persons who have seen, heard, or experienced by other senses, by inferences, and opinions etc., and that only is evidence. A witness ought to

depose to those things only which he has either seen or ascertained to be true by his bodily senses. Narada defines a witness साक्षी, thus:

समक्षदर्शनात् साक्षी विज्ञेयः श्रोत्रचक्षुषोः ।
श्रोत्रस्य यत्परो ब्रूते चक्षुषोर्दर्शनं स्वयम् ॥

—Narada, 148

—a person who actually or directly sees a particular thing or action or actually or directly hears a particular fact which is sought to be proved is a witness.

He refers to 11 kinds of witnesses.

एकादशविधस्साक्षी शास्त्रे दृष्टो मनीषिभिः ।
कृतः पञ्चविधस्तेषां षड्विधोऽकृत उच्यते ॥

—Narada, 149

—in Sastras 11 kinds of witnesses are to be found. Five कृतसाक्षिणः *i.e.*, pre-appointed or pre-constituted witnesses and six अकृतसाक्षिणः unappointed witnesses.

The five pre-appointed or pre-constituted witnesses are:

लेखितः स्मारितश्चैव यदृच्छाभिज्ञ एव च ।
गूढश्चोत्तरसाक्षी च साक्षी पञ्चविधः कृतः ॥

—Narada, 150

(1) attestors and scribes of a document, (2) a witness who is appointed by a party to see and speak to a particular fact and who is often reminded of the same by that party, (3) a voluntary or self-offered witness or an accidental witness who is neither a scribe nor an attestor of a document, (4) a clandestine witness employed by a party to watch the movements of his opponents and to overhear their talk and (5) defence witnesses.

The six unappointed witnesses are:—

अकृतः षड्विधो निस्यः सूरिभिः परिकीर्तितः ।
ग्रामश्च-प्राड्विवाकश्च राजा च व्यवहारिणाम् ॥
कार्येष्वभ्यन्तरो यः स्यादर्थिना प्रहितश्च यः ।
कुल्याः कुलविवादेषु भवेयुस्तेऽपि साक्षिणः ॥

—Narada, 152

(1) community or race (Village), (2) a judge, (3) a king, (4) officers, (5) a person sent by a debtor to a creditor and (6) caste people in cases of caste disputes. These six can be taken as witnesses in all matters.

Who are good witnesses:—These are

तपस्विनो दानशीलाः कुलीनाः सत्यवादिनः ।
धर्मप्रधाना ऋजवः पुत्रवन्तो धनान्विताः ॥

(1) Persons who practice penance, (2) Charitable persons, (3) Persons of high family, (4) Truthful persons (5) Persons who have got high regard for duty, (6) Straight-forward persons (7) Persons having children (8) and Rich persons.

Number of witnesses required:—Regarding the number of witnesses required the Smritis prescribe:

त्र्यवराः साक्षिणो ज्ञेयाः श्रौतस्मार्तक्रियापराः ।
यथाजाति यथावर्णं सर्वे सर्वेषु वा स्मृताः ॥

—Yagnavalkya.

त्र्यवराः साक्षिणोऽनिन्द्याः शुचयः शुद्धबुद्धयः ।

—Narada, 53

—at least there should be 'three witnesses' in a case. They must be persons performing Srouta and Smarta rites, noble-minded, and belonging to the same race and same caste. An exception to the rule is postulated by Yagnavalkya:

उभयानुमतः साक्षी भवत्येकोऽपि धर्मवित् ।

—even one learned witness is sufficient when he is agreeable to both parties. In the application of the rule according to Narada,

साक्षिविप्रतिपत्तौ तु प्रमाणं बहवो यतः ।
तत्साम्ये बहवो ग्राह्यास्तत्साम्ये स्मृतिमत्तराः ॥

—Narada, 229

—where there are several witnesses and there are material discrepancies in their evidence, the evidence of the majority is to be taken. If they are equal the evidence of the more worthy is to be accepted *c.f.*—*Testibus deponentibus in pari numero dignioribus est credendum*—Where the number of witnesses is equal on both sides the more worthy are to be believed.

Selection of witnesses:—Regarding selection of witnesses the rule of preference is.

ब्राह्मणा क्षत्रिया वैश्याः शूद्रा ये चाप्यनिन्दिताः ।
प्रतिवर्णं भवेयुस्ते सर्वे सर्वेषु वा पुनः ॥

—Narada, 154

—Brahmin witnesses for Brahmins, Kshatrias for Kshatrias, Vysyas for Vysyas and Sudras for Sudras. Likewise

श्रेणीषु श्रेणिपुरुषाः स्वेषु वर्गेषु वर्गिणः ।
बहिर्वासिषु बाह्याः स्युः स्त्रियः स्त्रीषु च साक्षिणः ॥

—Narada.

स्त्रीणां साक्ष्यं स्त्रियः कुर्युः........

—Manu.

—guild-men for guild-men, artisans for artisans, outcastes for outcastes and women for women are witnesses. An exception to the above rule is thus stated:

श्रेण्यादिषु च सर्वेषु कश्चिच्चेत् द्वेष्यतामियात् ।
तेभ्य एव न साक्षी स्यात् द्वेष्टारः सर्व एव ते ॥

—If among the members of the guild etc., mentioned above there is one member who is on inimical terms with the rest of the members, none of those members can be cited as a witness against that member, since they are all his enemies:—

Persons who are unfit to be witnesses:—According to Narada,

असाक्ष्यपि हि शास्त्रेऽस्मिन् दृष्टः पञ्चविधो बुधैः ।
वचनात् दोषतो भेदात् स्वयमुक्तिर्मृतान्तरः ॥

—Narada, 157

—there are five kinds of persons to be found in the Sastras who are unfit to be witnesses:

(1) by virtue of the precepts of the sacred texts themselves, (2) on account of blemish, (3) on account of discrepancies, (4) voluntary witnesses (5) dead persons etc.

(1) वचनात् by virtue of the precepts of the sacred texts themselves without any reason being assigned for the exclusion.

श्रोत्रियास्तापसा वृद्धा ये च प्रव्रजिता नराः ।
असाक्षिणस्ते वचनान्नात्र हेतुरुदाहृतः ॥

—Narada, 158

—Brahmins, well-versed in sacred learning, and practising religious austerities; persons practising penance; old people; religious mendicants or ascetics.

No reason is given for their exclusion.

(2) दोषात् on account of blemish:—

स्तेनाः साहसिकाश्चण्डाः कितवा वञ्चकास्तथा ।
असाक्षिणस्ते दुष्टत्वात् तेषु सत्यं न विद्यते ॥

—thieves, desperadoes or rash persons, fierce or wrathful persons, rogues, liars, cheats, swindlers, these people also cannot be accepted as witnesses since truth cannot be expected of them.

(3) भेदात् on account of discrepancies:

राज्ञा परिगृहीतेषु साक्षिष्वेकार्थनिश्चये ।
वचनं यत्र भिद्येत ते च स्युर्भेदसाक्षिणः ॥

—Narada, 160.

When there are discrepancies in the evidence of the witnesses of a case, they are called discrepant witnesses.

(4) स्वयमुक्तः, Voluntary evidence:

सूचीत्युक्तः स शास्त्रेषु न साक्षित्वमर्हति ।

—The evidence of a person who volunteers, should not be accepted. He is called in the Sastras सूची a spy or an informer.

(5) मृतान्तरः on account of death or destruction:—When the *factum probandum* or the fact to be proved is itself destroyed and also the party concerned, for whom has the evidence to be given?

By way of exception Narada has declared:

मृतान्तरेऽर्थिनि प्रेते मुमूर्षुश्रावितादृते ।

Bhavaswamy explains this passage thus:—

When the person who is about to die makes statements in a sound state of mind to his sons and relatives etc., that such and such people or such and such things or documents are evidence in a cause those statements are admissible in evidence.

साक्ष्युद्दिष्टो यदि प्रेयात् गच्छेद्वापि दिगन्तरम् ।
तच्छ्रोतारः प्रमाणं स्युः प्रमाणं ह्युत्तरा क्रिया ॥

When a witness who is summoned dies, or leaves for a foreign country, the persons who heard him speak about the facts in the case can be cited as witnesses; but their evidence can be rebutted.

Narada gives an exhaustive list of persons who are not fit to be witnesses:—

(1) दास Servant (2) नैकृतिक People who always try to pick holes in others (3) अश्रद्ध Erratic people (4) वृद्ध Old people (5) स्त्री Women (6) बाल Children (7) चाक्रिकाः Persons who live by grind-mill (8) मत्त Drunkards (9) उन्मत्त Lunatics (10) प्रमत्त Wanton or lascivious persons (11) आर्त Distressed persons (12) कितव Rogues (13) ग्रामयाजकाः Village-priests (14) महापथिक Persons bound for a long travel (15) सामुद्रवणिक् Sea-Tradesman

(16) प्रव्राजित Ascetics (17) आतुरा: Sickly-people (18) लुब्धक misers (19) श्रोत्रिय Persons versed in sacred-lore (20) आचारहीन Persons who do not observe religious practices (21) क्लीब Impotent persons (22). कुशीलवा: Dramatic actors (23) नास्तिक Atheists (24) व्रात्य a man of the first three classes who has lost caste owing to the non-performance of the principal samskaras or purificatory rites (especially investiture of the sacred thread); an outcaste (25) दाराग्नित्यागिन: Persons who have abandoned their wives and the sacred fire (26) अयाज्ययाजका: Persons who officiate as priests for the degraded or outcastes (27) एकस्थालि Persons having common-mess (28) सहाय Comrade or a friend (29) अरिचर a person who moves with the enemies (30) ज्ञाति Agnates (31) सनाभय: uterine brothers or sisters (32) प्रागदृष्टदोषा: Persons found to be guilty and previously convicted persons (33) शैलूष Dancers, musicians, leaders of a band (34) विषजीवि Persons who eke out livelihood by dealing in poison (35) आहितुण्डिका: Snake-catchers (36) गरद Person who poisons (37) अग्निद An incendiary (38) कीनाश A niggardly-person (39) शूद्रापुत्र: an illegitimate-son (40) उपपातका: Persons committing minor sins (41) श्रान्त Persons tired or fatigued (42) साहसिक Desperadoes or rash persons (43) अशान्त troublesome persons (44) निर्धूत Persons deserted or treated with contempt (45) अन्तावसायिन: Chandalas etc. (46) भिन्नवृत्ति perons following evil courses (47) असमावृत्त: A bachelor who has not finished his course of holy-study (48) तैलिक An oil-grinder or manufacturer (49) भृत्तिका: Devotees (50) भूताविष्ट Persons possessed (51) नृपद्विष: Disloyal persons (52) वर्षसूचक foretellers of rains (53) नक्षत्रसूचक Astrologers and Astronomers (54) अघशंसी Scandal-monger (55) हीनाङ्ग: Persons with defective organs (56) कुनखी Persons having bad fingers (57) श्वित्री White lepers (58) मित्रध्रुक् Ungrateful persons (59) शठ: Crafty persons (60) शौण्डिका: Arrack-vendors (61) ऐन्द्रजालिका: Magicians (62) उग्र: Harmful persons (63) श्रेणीगणविरोधिन: Unpopular persons (64) वधकृत् Slaughterer, a hangman, etc. (65) चित्रकृत् a painter (66) मङ्ख: Persons who go a-begging, carrying certain godesses. (67) कूटकारक Forgerer (68) कुहक: Conjuror (69) प्रत्यवसृत: A person who reverts from the third order (70) तस्कर A thief

(71) राजपुरुष Servants of the King, officials etc. (72) मनुष्यविक्रेता A person who sells men (73) विषविक्रेता poison vendor (74) अम्बुविक्रेता water vendor (75) लवणविक्रेता salt vendor (76) अपूपविक्रेता flour-cake vendor (77) वार्धुषिक: A usurer (78) कुलिक: A head or leader of a guild (79) स्तावक: A panegyrist (80) पित्रा विवदमान: One who quarrels with his father (81) अर्थसम्बन्धिन: Persons having wealthy-relations.

Exceptions to this rule are also laid down.

सर्वस्साक्षी संग्रहणे चौर्यपारुष्यसाहसे ।

—Yajnavalkya.

कार्यगौरवमासाद्य भवेयुस्तेऽपि साक्षिणः ।

—Narada, 188.

Anybody can be cited as a witness in cases of seduction of women, theft, assault, lottery, slander and libel, violence and rapine.

—Yajnavalkya.

Even the (unfit persons) can be witnesses according to the importance of the cause.

—Narada,

cf. Testis lupanaris sufficit ad factum in lupanari—A strumpet is a sufficient witness to a fact committed in a brothel.

Examination of witnesses:—The rules relating to the examination of witnesses are noteworthy.

साक्षिणः श्रावयेद्वादिप्रतिवादिसमीपगान् ।

Witnesses should be examined in the presence of both the parties.

स्वभावोक्तं वचस्तेषां ग्राह्यं यद्दोषवर्जितम् ।
उक्ते तु साक्षिणो राज्ञा न प्रष्टव्याः पुनः पुनः ॥

Evidence given by a witness naturally and without any effort should be accepted; and when once the witness so speaks out he should not be put to too much examination—.

अथवा कालनियमो न दृष्टः साक्षिणं प्रति ।
स्मृत्यपेक्षं हि साक्षित्वमाहुः शास्त्रविदो जनाः ॥

—Narada, 170.

There is no time-limit for the giving of evidence. As long as a witness remembers the facts of a case he can give evidence.

यस्य नोपहता पुंसः स्मृतिः श्रोत्रं च नित्यशः ।
सुदीर्घेणापि कालेन स साक्षी साक्ष्यमर्हति ॥

—Narada, 171

So long as a person's vitality is not gone, and his power of memory and hearing are sound, he is entitled to give evidence.

सुदीर्घेणापि कालेन लिखितः सिद्धिमाप्नुयात् ।
आत्मनैव लिखेज्जानन्न चेदन्येन लेखयेत् ॥

—Narada, 167.

The attestors and scribe of a document can give evidence after any length of time. An exception is :

अथवा कालनियमो न दृष्टः साक्षिणं प्रति ।

—Narada, 170.

(1) स्मारितं or a reminded witness—

अष्टमाद्वत्सरात् सिद्धिः स्मारितस्येह साक्षिणः ।

A witness reminded can be expected to remember facts only for about 8 years from the date of occurrence and if he attempts to speak to facts which occurred more than 8 years ago his evidence cannot be given much weight—

(2) यदृच्छाभिज्ञः Self-offered or casual witness—
He can be expected to remember facts only for five years.

(3) गूढः Secret witness—Three years.

(4) उत्तरसाक्षी Defence witness—One year.

Regarding administration of oath to witnesses, Manu has stated:

सत्येन शापयेद्विप्रं क्षत्रियं वाहनायुधैः ।
गोबीजकाञ्चनैर्वैश्यं शूद्रं सर्वैस्तु पातकैः ॥

To a Brahmin, if you speak falsehood your truth will perish.

To a Kshatriya "if you speak falsehood your chariot, bows and arrows will perish.
To a Vysya „ „ your cattle, seeds, and gold will perish.
To a Sudra „ „ all the evils in the world will befall you.

An interesting exception to the rule is mentioned by Yajnavalkya.

वर्णिनां हि वधो यत्र तत्र साक्ष्यनृतं वदेत् ॥

If giving out the truth would result in the capital punishment of a person belonging to any of the four castes, a witness may give false evidence. Vignaneswara, comments upon this passage thus:—

If speaking out the truth results in the capital punishment of either of the parties to an action; and suppressing the truth would result likewise to a third party, a witness should keep silent. If

the witness finds that he will not be allowed to go unless he gives out the truth he should try as far as possible to give evasive and inconsistent replies. If that too is not possible he should give out the truth; for, by speaking falsehood he not only commits that sin but also the sin of bringing about the death of another person.

(3) भुक्तिः *Possession or Enjoyment*—

Narada has stated:

"भुक्तिर्बैषां गरीयसी"

—Possession or enjoyment is superior to all.

कालातिहरणाद्भुक्तिरिति शास्त्रेषु निश्चयः ।

—Narada, 75.

It is laid down in scriptures that possession or enjoyment for a long time becomes the best evidence. *cf Prescriptis est titulus ex usus et tempore substantiam capiens ob auctoritate legis*—prescription is title derived from use and time taking substance from the authority of the law.

विद्यमानेऽपि लिखिते जीवत्स्वपि हि साक्षिषु ।
विशेषतः स्थावराणां यन्न भुक्तं न तत्स्थिरम् ॥

—Narada, 77.

In spite of the oral and documentary evidence if there is no actual possession or enjoyment it is not safe to act; more particularly in cases of immovable property.

पश्यतोऽब्रुवतो भूमेर्हानिर्विंशतिवार्षिकी ॥

If a person who is not the owner of the land enjoys it for more than 20 years openly and without objection from the real owner the latter loses his rights in that land but illegal possession for however long a time it may be cannot give any legal rights, and the person in wrongful and secret possession is liable to be punished as a thief.

Gautama says:—

अनागमं तु यो भुङ्क्ते बहून्यब्दशतान्यपि ।
चौरदण्डेन तं पापं दण्डयेत् पृथिवीपतिः ॥

c. f. Quod ab initio non valet in tractu temporis non convalescit —That which is bad in its commencement, improves not by lapse of time.

उपेक्षां कुर्वतस्तस्य तूष्णींभूतस्य तिष्ठतः ।
कालेऽतिपन्ने पूर्वोक्ते व्यवहारो न सिध्यते ॥

The real owner will be estopped if he stands by and keeps quiet without taking any action within the said period of 20 years.

आगमोऽभ्यधिको भोगात् विना पूर्वक्रमागतम् ।

Lawful acquisition is superior to possession except in cases where the latter is hereditary.

निर्भोगो यत्र दृश्येत न दृश्येतागमः क्वचित् ।
आगमः कारणं तत्र न भोगस्तत्र कारणम् ॥

When the person who alleges to be in possession cannot establish his possession or lawful acquisition of the property, it is the title that prevails and not the alleged possession.

युज्यतेऽनागमयस्तं न तद्भोगोऽतिवर्तते ।
प्रेते तु भोक्तरि धनं याति तद्वशायोग्यताम् ॥

If a trespasser who has been in possession for a long time without any disturbance or objection from the real owner dies, that property goes to his heirs, and in an action against the heirs the burden of proving title lies on the real owner.

आहर्तैवाभियुक्तः स्यान्नार्थानामुद्धरेत् पदम् ।
भुक्तिरेव विशुद्धिस्स्यात् प्राप्ता या पितृतः क्रमात् ॥

—Narada, 90.

If the trespasser himself is sued during his life time, the burden of establishing possession for 20 years lies on him and if he fails to do so the real owner gets the property. In the case of the heirs of a trespasser his possession is good evidence in their favour only when it is proved that he was in undisturbed possession during his lifetime.

तथारूढविवादस्य प्रेतस्य व्यवहारिणः ।
पुत्रेण सोऽर्थः संशोध्यो न तद्भोगोऽतिवर्तते ॥

—Narada, 93.

If the trespasser dies pending the suit the burden of proving his possession for over 20 years lies on his heirs in the first instance.

आगमेन विना पूर्वं भुक्तं पूर्वैस्त्रिभिस्तु यत् ।
न तच्छक्यमपाकर्तुं क्रमात्त्रिपुरुषागतम ॥

Mere proof of possession for three generations even without lawful acquisition is good evidence against the real owner, and he can never recover that property. An exception is:

आधिः सीमा बालधनं निक्षेपोपनिधी स्त्रियः ।
राजस्वं श्रोत्रियद्रव्यं नोपभोगेन जीर्यति ॥

—Narada, 81.

—in cases of mortgages, boundaries, minor's money, deposit, bailments, women, 'king's money', money of a learned Brahmin, the property can be never lost to the real owner for want of enjoyment or possession. Narada further states:

अन्वाहितं हृतं न्यस्तं बलावष्टब्धयाचितम् ।
अप्रत्यक्षं च यद्भुक्तं षडेतान्यागमाद्विना ॥

—Narada, 92.

—Property bailed; property stolen; property deposited; property got by force; property taken with permission; property got by the servant without the knowledge of the master—in these six cases the persons who are in possession or enjoyment of the property cannot claim it to the detriment of the real owner merely by virtue of their possession.

Presumptions and Circumstantial evidence:—

असाक्षिप्रत्ययास्त्वन्ये षड्विवादाः प्रकीर्तिताः ।
लक्षणान्येव साक्षित्वे तेषामाहुर्मनीषिणः ॥

—Narada, 172.

—there are six classes of cases which don't require any proof. Circumstances or symptoms etc., alone are evidence in such cases. They are:

(1) 'उल्काहस्तोऽग्निदो ज्ञेयः' । A person with a fire brand in his hand, standing near a burning house may be presumed to be the incendiary.

(2) 'शस्त्रपाणिस्तु घातकः' । A person with a knife or sword in his hand, standing alone by the side of a stabbed person may be presumed to be the murderer.

(3) 'केशाकेशगृहीतस्तु युगपत् पारदारिकः' । When two persons are found engaged in a sudden hair-to-hair fight in the presence of a lady the presumption is that it is a case of adultery.

(4) 'कुद्दालपाणिर्विज्ञेयः सेतुभेत्ता समीपगः' । A person with a hoe in his hand standing near a broken bund may be presumed to have caused the breach.

(5) 'तथा कुठारपाणिश्च वनच्छेत्ता प्रकीर्तितः' । A person with an axe in his hand standing by the side of a fallen tree may be presumed to have felled it.

(6) 'अभ्यग्रचिह्नो विज्ञेयो दण्डपारुष्यकृन्नरः' । A person found with cloths torn, face and ears reddened and such other fresh symptoms may be presumed to have assaulted somebody.

The above list is merely illustrative and not exhaustive

'आसाक्षिप्रत्यया ह्येते पारुष्ये तु परीक्षणम्' ।

—Narada, 175.

Of the above the first five do not require any rebuttal evidence but in the case of the last *i.e.*, alleged assault, battery and slander the presumption may be rebutted. As to how the presumptions may be rebutted, Narada states:

कश्चित्कृत्वात्मनश्चिह्नं द्वेषात्परमुपद्रवेत् ।
हेत्वर्थगतिसामर्थ्यैस्तत्र युक्तं परीक्षणम् ॥

for instance one may oneself inflict injuries on one's body, tear one's cloths etc., run up to the king and lodge a complaint against one of his enemies that he was beaten by him. In such cases the king or the Judge has to consider four things:—

हेतु: *i.e.* the demeanour of the complainant, his anxiety, the tone in which he complains, his general appearance, perspiration etc.

ii अर्थ:— The nature of the injuries whether they are simple or grievous.

iii गति:—Possibilities and probabilities; when there is a swelling or intumescence on the back of the person, whether it is possible or probable that the injury can be self-inflicted.

iv सामर्थ्यम्—Capacity or the strength of the persons, whether the complainant is stronger or weaker than the accused.

Missing persons:—If a person is not heard of for 12 years the presumption is that he is dead and his obsequies are to be performed by his kinsmen. But in the case of missing parents their sons have to wait for 15 years and then perform the Sradha. Thus in

वैद्यनाथीयं page. 125 it is stated:— यस्य प्रोषितस्य वृत्तान्तः नैव श्रूयते तस्य द्वादशात् वर्षादूर्ध्वं विधिवदौर्ध्वदेहिकं कुर्यात् । "पितरि प्रोषिते यस्य न वार्ता नैव चागतिः । ऊर्ध्वं पञ्चदशाद्वर्षात् कृत्वा तत् प्रतिरूपकम् ॥"

Burden of proof in general:—With reference to burden of proof Narada has stated:

सर्वेष्वर्थविवादेषु बलवत्युत्तरा क्रिया ।

—generally in all cases of money-disputes the burden of proof lies on the defendant.

आधौ प्रतिग्रहे क्रीते पूर्वा तु बलवत्तरा ।

—in cases of mortgages, gift or sale, burden of proof lies on the plaintiff. Bhavaswamy gives this example. *A* mortgaged his

land first to *B* and then to *C*. In an action by *B*, he has to prove that the lands were first mortgaged to him.

प्राङ्न्यायकारणोक्ते तु प्रत्यर्थी निर्दिशेत् क्रियाम् ।
मिथ्योक्तौ पूर्ववादी तु प्रतिपत्तौ न सा भवेत् ॥

When the defence is *res judicata* or discharge, burden of proof lies on the defendant. When the defence is one of denial plaintiff has to prove the case. If defendant admits the claim plaintiff need not prove anything.

Judgments जयपत्र :—A judgment is admissible in evidence to show that the matter was once decided प्राङ्न्याय. But there are cases where the defeated party in the prior action can show that the previous decision is not valid and the case should be decided again. Following are some of the typical examples.

स्त्रीषु रात्रौ बहिर्ग्रामादन्तर्वेश्मन्यरातिषु ।
व्यवहारः कृतोऽप्येषु पुनः कर्तव्यतामियात् ॥

—Narada, 43.

When the transaction takes place with ladies, during nights, outside the village, in the innerparts of the house and in the midst of enemies, even though the matter is once decided it is to be tried again.

Miscellaneous:—

प्रमादाद्धनिनो यत्र न स्याल्लेख्यं न साक्षिणः ।
अर्थं चापह्नुते वादी तत्रोक्तस्त्रिविधो विधिः ॥

—Narada, 235.

If unfortunately a creditor has not got any documents to evidence his debt nor any witnesses and the debtor denies the debt three courses are open to the creditor:

चोदना प्रतिकालं च (२) युक्तिलेशस्तथैव च ।
तृतीयः (३) शपथः प्रोक्तस्तैरेनं शोधयेत् क्रमात् ॥ (१)

—Narada, 236.

—(1) demanding often (in the presence of mediators); (2) by tact, making the debtor admit the liability; (3) putting the debtor to oath. Narada declares:

अभीक्ष्णं चोद्यमानोऽपि प्रतिहन्यान्न तद्वचः ।
त्रिश्चतुष्पञ्चकृत्वो वा परतोऽर्थं स दापयेत् ॥

—Narada, 237

When the creditor makes a demand three, four or five times and the debtor keeps silent without denying the debt the presumption is that he really borrowed the amount—

चोदनाप्रतिघाते तु युक्तिलेशैस्तमन्वियात् ।
देशकालार्थसंबन्धपरिमाणक्रियादिभिः ॥

—Narada, 233.

When the frequent demanding proves useless, the creditor should try the second method *viz.* युक्ति, tact, and proof by probabilities, by specifying the place, time, the amount borrowed, and the relationship between the parties.

When the two methods fail the debtor may be challenged to take oath, that he had not borrowed.

SUMMARY OF ENGLISH CASES.

Canada Rice Mills, Ltd. *v.* Union Marine and General Insurance Co., Ltd. (1940) 4 All.E.R. 169 (H.L.).

Insurance—Marine insurance—Perils of the sea—Ventilators closed in rough weather—Goods damaged through lack of ventilation—Damage whether due to "perils of the sea."

Where under a policy of marine insurance a cargo of rice was insured against the perils of the sea and during rough weather in the voyage the ventilators were closed and the goods were damaged through lack of ventilation,

Held, that the damage having been caused by action necessitated to prevent the peril of the sea (*viz.*, to prevent incursion of sea-water through the ventilator) it was a loss due to the perils of the sea and can be recovered under the Policy.

Merchants Insurance Co. *v.* Hunt, (1940) 4 All.E.R. 205 (K.B.D.).

Insurance—Motor insurance—Non-disclosure of facts in proposal—Unqualified negative answer—Not to be construed as to the best of proposer's knowledge.

In a motor insurance proposal form in answer to the question, "Have you or any person who to your knowledge will drive the car ever been convicted of an offence in connection with a motor vehicle or motor cycle or is any prosecution pending?", the answer given was "No".

Held, that the answer was an assertion first of all that he has the knowledge which he purports to impart and secondly that that knowledge is what he is imparting. The answer to

the question was a material matter and will affect the question of liability under the policy. But the insurance company expressly contracted in the policy that "nothing in the policy will affect the right of any person indemnified by the policy or of any other person to recover an amount under or by virtue of the provisions....." The company therefore cannot avoid the policy when strangers are claiming under it.

POLLOCK *v.* BUNT, LTD., (1940) 4 All.E.R. 264 (C.A.).

Master and servant — Doctrine of common employment — Limitations.

It is not sufficient to debar a plaintiff from recovering against the employers, in respect of an injury attributable to another man also in their employment, by whose negligence the plaintiff has suffered, merely to assert that they were both servants of the defendant company or firm in the sense that they were both paid their wages by that firm or company. The rule does not apply where the injured man and the negligent co-employee are not engaged in the same common work, or are not fellow labourers in the same work, or are not engaged in different departments of duty. Where the plaintiff whose duty was to attend to mail orders was injured while driven in a car belonging to the employer for carrying servants of the company from one point to another in the course of his duties the doctrine of common employment is not applicable to debar the claim for damages.

FORESTER *v.* LLANELLY STEEL CO., (1941) 1 All. E. R. 1 (H.L.).

Workmen's Compensation — Various Industries Scheme (Silicosis, 1931)—Breaking of furnace lining of bricks containing silica for repairing—If included in "Crushing silica bricks" in the process of manufacture.

A Various Industries (Silicosis) Scheme (1931) made in accordance with the Workmen's Compensation Act provided *inter alia* for compensation for workmen employed in "the process specified and those processes only" in the trades thereunder mentioned and in the case of workers engaged in the manufacture of steel or in steel foundries the specified processes were thus described:—"crushing or grinding of silica rock, or any handling incidental to such crushing or grinding, or crushing or grinding of bricks or other articles containing no less than 80 per cent. total silica". A workman was engaged in such works and he built and repaired smelting furnaces and ladles, and, while engaged on the former was smelting bricks containing

more than 80 per cent. of silica. He had to break down old layers of bricks in the inside of the furnace and build up new layers. The process required use of crowbars to break them down and new bricks often had to be chipped to shape. These involved the creation of large quantities of silica dust which the workman had to inhale and in consequence contracted silicosis. In a claim for compensation,

Held, that the work amounted to "crushing bricks containing more than 80 per cent. of silica" under the scheme and the workman was entitled to compensation. "Crushing" does not necessarily mean crushing to powder.

(1940) 1 All.E.R. 235, reversed.

BENHAM *v.* GAMBLING, (1941) 1 All.E.R. 7 (H.L.).

Tort—Negligence causing death—Damages for "loss of expectation of life"—Assessment—Considerations.

In an appeal against the award of £ 1,200 as damages for loss of expectation of life of a boy aged 2½ years in a motor accident,

Held, that the damages in fact were incapable of being measured in coin of the realm with any approach to real accuracy. The assessment of damages is not to be made by applying the statistical or actuarial test. Such damages should not be calculated solely or even mainly, on the basis of the length of life which is lost. Before damages are awarded in respect of the shortened life of a given individual under this head it is necessary for the Court to be satisfied that the circumstances of the individual life were calculated to lead on to the balance, to a positive measure of happiness. The question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness. The test is not subjective and the right sum to award depends on an objective estimate of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. No regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life not of loss of future pecuniary prospects. The uncertainty about the child's future must also be considered. In assessment of damages under this head a very moderate figure should be chosen.

(1940) 1 All.E.R. 275, reversed.

SCAMMELL *v.* OUSTON, (1941) 1 All.E.R. 14 (H.L.).

Contract—Formation—Order for goods on the understanding that the balance of purchase price can be had on hire-purchase terms—How far a completed contract.

The plaintiffs wished to acquire a new motor van, giving in part exchange an old van. On 23—11—1937 an interview took place between the partner of the plaintiff firm and a representative of the defendants. On the following day the defendants wrote to the plaintiffs a letter giving a quotation for the van proposed to be acquired by plaintiffs and the allowance to be made for the old van. On 6—12—1937 in an interview the offer contained in the letter of 24—11—1937 was accepted by the plaintiffs. On 7—12—1937 defendants wrote to plaintiffs thanking them for the order and asking them to send the official order to complete their records. This request was complied with by letter dated 8—12—1937 in the following terms: "We beg to acknowledge receipt of your acceptance of our order for vehicles as per specifications sent on November 25. This order is given on the understanding that the balance of purchase price can be had on hire-purchase terms over a period of 2 years." Throughout the negotiations the plaintiff wanted to purchase on hire-purchase terms and there was never any question of an out and out purchase by the plaintiffs. The defendants repudiated the transaction and in an action for damages for breach of contract,

Held, reversing the decision of the C.A. in (1940) 1 All.E.R. 59, that the crucial sentence, "This order is given on the understanding that the balance price can be had on hire-purchase terms" was so vaguely expressed that it cannot standing by itself be given a definite meaning. As there was no *consensus ad idem* there was no contract and therefore no breach.

LUXOR (EASTBOURNE), LTD. (IN LIQUIDATION) AND OTHERS v. COOPER, (1941) 1 All.E.R. 33 (H.L.).

Principal and Agent—Promise to pay commission on completion of sale of principal's property—Willing buyer found—Principal refusing to complete sale—Agent's right to commission.

The appellants were private companies and were the freeholders of the Luxor Cinema at Eastbourne and the Regal Cinema at Hastings respectively. The board of directors of each of the appellant companies was composed of the same individuals and one *W.B.* who was the managing director of both companies, held the majority of the issued shares. On the death of *W.B.* on 11—9—1935 his son *H.B.* became a director in his place. Prior to his death *W.B.* in the summer of 1935 had asked the companies' auditor *E.* to get an offer for the purchase of the two cinemas and *E.* said that he would approach his "client" meaning thereby the respondent. *W.B.* was alleged to have said that *E.* would have a commission. After *W.B.'s* death another director *G.* told *E.* after a directors' meeting that the directors had decided to sell the cinemas and that *E.'s* client should make the offer through the companies' solicitor who had authority to deal with the matter. *E.* told the respondent of

this and the respondent shortly afterwards introduced to *E.* a prospective purchaser willing to negotiate for the properties. *E.* took the respondent to meet the companies' solicitor. Ultimately on 11—10—1935 after negotiations the solicitor's firm replied to *E.* confirming that on completion of the sale of the cinemas to the purchaser a procuration fee of £ 10,000 was to be paid to the respondent. At the directors' meeting held on 2—10—1935 to consider the offer, *H.B.* opposed the motion for accepting the offer. The sale was not proceeded with and the disposal of the cinemas ultimately took place by way of a sale of shares in the appellant companies to another party. In an action by the respondent for damages for not carrying through the sale, thereby preventing the respondent earning his commission,

Held, upon a true construction of the contract the agent also took the risk of the owner not being willing to conclude the bargain with the agent's nominee and the respondent's claim must fail. An implied term that the principal will not refuse to go on with the sale cannot be inferred and as no binding contract was made between vendor and purchaser, the agent was not entitled to the commission. Decision of Court of Appeal, (1939) 4 All.E.R. 611, reversed.

GRIFFITHS AND ANOTHER *v.* SMITH AND OTHERS, (1941) 1 All. E.R. 66 (H.L.).

Tort—Invitation by management of a non-provided school—Injury to invitee by collapse of floor due to want of repairs—Liability—Public Authorities Protection Act—Limitation under.

A building belonging to a non-provided school was nearly 100 years old. The headmaster with the authority of the managers invited among others the plaintiff whose son was a pupil at the school to attend an exhibition on the premises. Owing to want of repair the flooring collapsed and the plaintiff having been injured sued the manager for damages. It was found as a fact that those who were charged with the duty of keeping the premises in repair had not taken reasonable care to discharge that duty. It was the duty of the manager to keep the premises in good repair out of voluntary subscriptions or donations and in some cases, trust funds or endowments. The action was commenced 22 months after the accident and the managers claimed that it was barred under Public Authorities Protection Act, S. 1.

Held, that the managers authorised the exhibitions in the course of carrying on the public elementary school and can avail themselves of the protection of the Public Authorities Protection Act and the action not having been commenced within 12 months was barred. Decision of the Court of Appeal, (1939) 2 All. E.R. 76, affirmed.

SUGAR *v.* LONDON, MIDLAND AND SCOTTISH RAILWAY CO., (1941) 1 All.E.R. 172 (K.B.D.).

Contract—Railway ticket—Conditions printed on back—Notice drawing attention to it blotted out by date stamp—Effect.

Conditions were printed on the back of a railway ticket referring passengers to conditions contained in the railway time tables and bills protecting the railway company against claims for damages for negligence. On the ticket issued to the plaintiff the words "For conditions see back" were blotted out by the date stamp which was put on the face of the ticket. In a claim for damages for injuries sustained by the plaintiff by falling into a hole while she was leaving the station, by reason of the defendant's alleged negligence in leaving the hole in a passage,

Held, that the railway company did not do that which was reasonably sufficient to give the plaintiff notice of the conditions and therefore the plaintiff was entitled to recover damages.

CAMPBELL *v.* CAMPBELL, (1941) 1 All.E.R. 274 (C.A.).

Costs—Solicitor's lien on costs ordered to be paid to his client—If "property recovered or preserved" within the meaning of Solicitors Act (1932), *S.* 69*—Solicitor's common law right.*

By decree *nisi* in a divorce petition the husband the petitioner was ordered to pay his wife's taxed costs. The intervener in the wife's cross-petition had previously been dismissed from the suit with costs against the wife. The wife's costs were taxed at the sum of £ 826-15-10 to meet which there was a sum of £ 550 in Court. The sum was paid out to the appellant who was the wife's solicitor leaving a balance of £ 276-15-10 unprovided for. On July 31, 1940, an order was made for payment of this balance to the appellant by the respondent. The costs of the intervener were taxed at £ 302-1-11 and by a document dated July 3, 1940, the intervener assigned this sum to the respondent in consideration of his paying her a like sum in cash. The appellant took out a summons on August 23, 1940, for an order that he should have a charge to the extent of £ 276-15-10 upon the costs ordered to be paid by the respondent to his wife.

Held, that without deciding whether costs were not "property recovered or preserved" within the meaning of Solicitors Act (1932), S. 69 the solicitor's claim could be made at common law for a charging order on a sum ordered to be paid as costs.

JOTTINGS AND CUTTINGS.

UNVEILING OF MR. GANTI LAKSHMANNA'S PORTRAIT.

A portrait of the late Mr. Ganti Lakshmanna was unveiled at the premises of the Madras Advocates' Association, on Thurs-

day, the 1st May, 1941, by the Hon'ble Mr. Justice Venkataramana Rao.

In requesting His Lordship to unveil the portrait, the learned Advocate-General (Sir Alladi Krishnaswami Aiyar) observed:

"I knew the late Mr. Lakshmanna from the days the latter was practising at Rajahmundry and I was always impressed with the careful preparation he made of every case entrusted to him, his powers of cross-examination and his adroitness in handling a judge. He always commanded the respect of judges. He had a love for ornate expressions and sometimes also for quaint phraseology and believed in the dignity and grandeur of the spoken word. There was hardly any person at the Bar, especially from Andhradesa, who had not received some kindness at his hands. Hospitality was the essence of his life. He greatly encouraged pundits and scholars and he was generous to a fault. By his death the profession is distinctly a loser. I am glad to note that the Advocates' Association is honouring the memory of an esteemed member of the profession and I hope that the members of the Association will be inspired by the example set by the late Mr. Ganti Lakshmanna."

In unveiling the portrait, the Hon'ble Mr. Justice Venkataramana Rao said:

"When the Honorary Secretaries of the Advocates' Association invited me to preside over this function I responded with pleasure as it gave me an opportunity not only to join in the public testimony of the Bar and the Bench to the utility and usefulness of a life which embodied the best traditions of the legal profession but also to pay my personal tribute to the memory of a comrade at the Bar, whose friendship I cherished. While at the Bar, I had many opportunities of coming into contact with him and I soon learned to value the talents and virtues which he brought into the profession. This function is a testimony of your regard and love for him. His portrait will keep his memory alive and be an inspiration to the future generation of lawyers, and particularly, the lawyers from Andhradesa.

Born in 1877 in Perur, Amalapur taluk, East Godavari District, after a distinguished academic career, Mr. Lakshmanna joined the Rajahmundry Bar in about 1901. He soon acquired the reputation of being a sound and able lawyer and rose to be one of the accredited leaders of that Bar and acted as the Public Prosecutor for several years. Finding the district of East Godavari too limited for his talents, he desired to have a wider sphere for his activities and joined the Madras Bar in 1920.

The story of the advent of the Andhras to the Madras Bar was an adventure of faith. Quite early a few venturesome advocates like my friend Sir Vepa Ramesam tried to carve out their careers at Madras. But it was not until Mr. Peri Nara-

yanamurti and Mr. Prakasam, who with their boldness and daring pushed themselves up, that their settlement for good began. Mr. Ganti Venkataramayya, Mr. B.N.Sarma and others left the provincial Bar for the metropolis. It was their place that Mr. Lakshmanna came to take. Like them, he came to Madras with an established provincial reputation and assured of a clientele. His industry and capabilities secured him not only an extensive practice but also marked him for leadership among his Andhra fellowmen. When he left us he was occupying a place among the foremost at the Bar.

Two qualities of Mr. Lakshmanna as an advocate have impressed me. He was, what I may call, a persistent advocate. What he considered to be the crucial point of his argument he pressed home from different lines of approach till he assured himself that it had gone home. He had a remarkable equanimity of temper. Painstaking assiduity was there and warmth of debate as well. But I never saw him lose his temper. The smile never departed from his lips nor serenity from his argument. He presented his case with clearness and argued it with considerable zeal and energy. He was a strong opponent and I felt the strength of it in a heavy case where I was opposed to him. It went on in the Sub-Court of Bezwada off and on for more than a year. It was a complicated case full of facts and figures. I admired the labour, energy and the meticulous accuracy with which he mastered them. Mr. Lakshmanna possessed a sound knowledge of law. He never committed the sin of arguing a case without reading his papers. His preparation was thorough. He was a very conscientious advocate. Mr. Lakshmanna rose from the ranks and was a stranger to 'aloofness'. His juniors liked him and he treated them like his brothers. His clients clung to him. He was a poor man's friend and full of human kindness and it was well known that he was generous to a fault. Though bashful and reserved by nature, persons who came into contact with him knew that he put his friends at ease and conversed freely with them. He was a true gentleman. He had the talent of not offending. He was often humorous and indulged in witty talk and enjoyed a laugh. He deservedly earned a high respect, both from the Bar and the Bench.

It is but just and fitting, that this Association, of which he was a most useful and respected member for many years, should honour his memory by having his portrait on the walls of the Association. May his memory be cherished for long.

BAR'S FAREWELL TO MR. JUSTICE PANDRANG ROW.

There was a large gathering of Advocates present at the Seventh Court Hall, on Friday, the 2nd May, 1941, to bid fare-

well to the Hon'ble Mr. Justice Pandrang Row, who is retiring from service in June. On behalf of the Bar, the Advocate-General (Sir Alladi Krishnaswami Aiyar) said:

"The Bar has assembled here to bid your Lordship farewell on the eve of your retirement. In the years you have been here with us Your Lordship has won the esteem of the Bar for your intellectual brilliance, your instinctive sense of justice and your quick grasp of and insight into the complicated facts and legal points involved in the causes which were heard by you. It took some time for the Bar to get accustomed to your Socratic method, your habit of testing every contention urged by the Bar by a counter-contention or suggestion from the Bench and taking counsel by surprise by questioning the very premises which counsel might have unguardedly taken for granted; but soon the Bar got accustomed to your manner and began to appreciate and admire those very qualities. The most adroit counsel could not get away from a point put forward by Your Lordship and could not cloud the relevant issues by clever evasion or foggy verbiage.

A punctilious insistence on the use of the correct expression was a striking feature of Your Lordship on the Bench, and not infrequently did the Oxford dictionary, when indented upon, support you as against some who might swear by the great lexicon which sometimes let them down. Your insistence on precision of expression no less than of thought might occasionally have led Your Lordship to what seemed to be bantering sallies which, if enjoyable to strangers to the contest, might prove disconcerting to counsel engaged in the fray. But we that practised before you came to realise that your only object in questioning was to rivet the attention of counsel to the crucial and essential points in the case.

In your career you have demonstrated that subtlety and the power of close ratiocination are not the special characteristics of an advocate or a judge recruited from the Bar, and that a judge who has not had the advantage of a practice at the Bar might as keenly appreciate the intricacies and subtleties of the law as one who had it. I have often felt that a judge, weighed down by a knowledge of too much case law and conflicting decisions might even suffer from it and it may be refreshing and stimulating to grapple with a point on first principles, though the course is by no means clear either to the judge or the advocate at the present day.

More than every other judicial quality what made a profound impression on the Bar was your passion for justice and a feeling, if I may say so, for the under-dog which enabled you to get rid of oppressive technicalities, if occasionally you were not loth to use those technicalities for the purpose of serving the

paramount interests of justice. To get to the heart of a case and to arrive at a sound conclusion in regard to questions of fact involving complicated details and examination of human motives is a much more difficult task for a judge, I should think, than even to decide a recondite point of law with the assistance of counsel engaged on both sides, and we have always found your judgments on questions of fact eminently satisfactory. In no field was this passion for substantial justice more pronounced than in the protection of the liberty of the subject and benignant interpretation of legislation designed to promote social welfare. Your Lordship never exhibited any bias against new methods of approaching social problems or ameliorative legislation in this regard. The most difficult task of a judge of the present day is that, while in interpreting the law and administering it he cannot depart or deviate from recognised judicial canons he has necessarily to be in touch with the currents of social life which demand a freshness of outlook and a broad humanity.

We will be missing Your Lordship very much in these halls for a long time. Let me once again on behalf of the Bar bid you farewell and pray that you may long enjoy rest, health and happiness."

Mr. Justice Pandrang Row in his reply observed:

"I wish at the outset to thank you Mr. Advocate-General for the kind words which you have used in bidding me farewell. I hope that the farewell is only of a judicial nature, for I will continue to meet you all in other places where there is more freedom of intercourse than between the Bench and the Bar. The Advocate-General as representing the Madras Bar has shown how successfully a lawyer can make bad things look good. He has painted my characteristics in such a way that I could hardly recognise myself. Any way what all the Advocate-General had stated, I take it, were well meant. While not taking credit for the good things you have said, I shall remember the kind feelings which prompted you to utter all these sentiments. I must say that while I tried my best to do justice according to law, I have been guilty of a certain harshness of manner and perhaps I have allowed my tongue to get the better of my judgment and said things which ought not to have been said from my place on the Bench or said things in a way which might have been improved. In making this confession I have only this excuse, that it was all done with the best of intentions and there was nothing in the heart. As days passed, I recognised that it was a mistake on my part to have allowed my nature to prevail to such an extent and I hope the members of the Bar will forget those things. On such an occasion like this I do not propose to deal with any generalities. It is a purely personal function and therefore it is not the proper platform nor the proper time to deal with subjects

which are of interest to you. I have found in my life that I can say something in the course of a conversation rather than in a public speech. I thank you gentlemen for the kindness which prompted this function and which has brought you here in such large numbers. I feel it not so much as a compliment to me but more as an indication of your own never failing kindness.

The assistance which the Bar has given to the judges is something, of which no adequate account could be given without some incriminating confessions. I do not propose to incriminate myself. I do not want to say how much I have been helped by the Bar. You may take it as a general statement that without you, it would have been almost impossible, in a majority of cases, for me to do my work with satisfaction. If I have the satisfaction that I have done my duty well, it has been due to the ungrudging assistance given by you, in spite of my faults of manners and all other sorts of faults. You have been giving me assistance in the spirit of comradeship and it is very good of you to have thought of having this occasion to make a public announcement of your kindly feelings towards me. On a formal occasion like this, I do not feel at home but, I may tell you, that informally I feel I can hold my own. I thank you once again and I hope you will remember me as one who has done his work, not wisely nor prudently, but as one who did his work to the best of his ability".

Jettison of a Judicial Wig.—Like other mundane things, even judicial wigs have on occasion suffered mishap. One of the most noted of these occurred in the judicial career of Lord Ellenborough. On that occasion the Chief Justice was being accompanied by Lady Ellenborough in the tour of the circuit. Like quite ordinary persons, the Chief Justice had a profound and not unreasonable antipathy to his carriage being encumbered—so he put it—with unnecessary band and other boxes containing the numerous hats and other paraphernalia of a lady's wardrobe. On this occasion his Lordship's foot, after a while *en route,* came in contact with one of the obnoxious receptacles, whereupon, uttering some ejaculations of an objurgatory character, he jettisoned the box, at the same time commanding the coachman to drive on. On reaching the circuit town the chief proceeded to array himself for the Bench and demanded his wig, a request which was meekly answered by the attendant with the statement that "It was thrown out of the carriage window!" What is the moral? Surely this, that even Chief Justices sometimes act hastily, quite like ordinary mortals, and have to repent at leisure.—*The L.T.*, 1940, *p.* 332.

Judicial Authors.—The appearance of a new book from the pen of Lord Justice MacKinnon, bearing the title "On Circuit," is fresh evidence, if that were needed, of the learned Lord Justice's keen interest in subjects outside those concerned with the construction of charter-parties and bills of lading into the mysteries of which he was early indoctrinated while in the chambers of the late Lord Justice Scrutton. A few of his predecessors on the Bench have, like him, also found relaxation and pleasure in contributing to *belles lettres,* for example, Lord Bowen and Lord Darling, each possessing a kindly wit and the gift of felicitous expression.. The majority of our judges have been content to add to the wealth of precedent which we study not so much for pleasure but for professional edification. Some people, no doubt, possess a catholic taste in letters, as had a former Archbishop of Canterbury, who at a social gathering remarked that he had never read a book from which he had not derived some profit. Among his hearers on that occasion was Mr. (later Vice-Chancellor) Wickers, who quietly asked, "Did your Grace ever try the second volume of 'Vesey and Beams'," a work not unfamiliar to equity practitioners but not regarded as containing the sprightly product of Lord Eldon's intellect. One gathers that this volume had not come within the Archbishop's course of reading.—*The S.J.*, 1940, *p.* 709.

The Week's Personality.—When Sir James Scarlet became Lord Abinger, Chief Baron of the Exchequer in 1834, he left behind him a greater reputation as an advocate than he was to acquire in his ten years as a judge. At the Bar his success had been extraordinary and his influence with judges almost magical. The wits said that he had invented a secret machine to make the members of the court nod their heads to his propositions and once an angry opponent suggested that the King's Bench Judges virtually allowed him to preside there. Yet, he did not usually rely on the rhetoric of advocacy, nor was he a deep-read lawyer. An easy gentlemanly, colloquial appeal to the understanding of his hearers, helped by a musical voice and a handsome appearance, somehow made his arguments seem obviously right. His way with juries was not to address them collectively, but to select one with whom he reasoned as best he could, placing himself as it were in mental communication with him and going on till he felt he had convinced him. When he appeared for the defendant in an action over a nuisance alleged to be dangerous to health, his cross-examination of the plaintiff's chief witness, a lady who lived near by consisted almost entirely of solicitous enquiries as to her domestic relations. She became most confidential and out of her own mouth he showed that in the immediate vicinity of the alleged nuisance she had reared a large, healthy family.—*The S.J.*, 1940, *p.* 716.

Hog and Bacon.—Among other stories recalled by Balfour Browne is that which tells of the play on the words "Hog" and "Bacon". It seems that Sir Nicholas Bacon, the father of the more famous Francis, was reputed a very great judge in his day. Once, when going the northern circuit, he had to sentence a prisoner named Hog, who, when called upon to state why he should not be punished for the offence with which he was charged, pleaded, somewhat irrelevantly, that he was akin to the judge. "How is that?" asked Sir Nicholas. "If it please you, my Lord," was the answer, "thy name is Bacon and mine is Hog, and in all ages Hog and Bacon have been so near kindred that they were not to be separated." According to the legend Bacon *pere's* reply was this: "Aye, but you and I cannot be kindred except you be hanged, for Hog is not Bacon until it is well hanged." If this story is not strictly authentic it is certainly *ben trovato,* and it had, also according to legend, a modern *replica,* for it is said that on one occasion Mr. Justice Hawkins, being asked what he would have for lunch, looked down the table and then said, "I will try some of that hung beef". "It is not hung beef," said some one but added, "it will be sure to be hung if the judge tries it," an apt observation in view of that judge's alleged "hanging and quartering" propensity.—*The L.T.*, 1941, *p.* 10.

Hot and Cold.—Last term while the Court of Appeal was sitting in a basement shelter one day the Master of the Rolls suggested that Serjeant Sullivan who was engaged in the case might find the open door-way near him too cold. "The superficial area of some counsel," replied the Serjeant "does not present much bodily surface to the draught." Those who have been discriminating enough to read his reminiscences will recall a delightful sketch of "Bones" Sullivan standing beside "Belly" McSwiney, drawn when they were both King's Serjeants in Ireland, and will understand what he meant. Whether or not there is a scientific law of protective leanness, the attitude of Bench and Bar towards draughts has long run to extremes from Mr. Baron Parke, who on the coldest day of early spring would insist on every window in court being open, to a much later judge, who would have them all shut and get a policeman to sit on the ventilator. Among the adherents of the former school can be numbered Judge Konstam, the "fresh air judge," who once in ordering the opening of the windows complained that "asphyxia seems to be a favourite form of death in many of our courts." Between the two forms of suffering Mr. Justice Goddard found himself in a difficult position at Durham a couple of years ago, for while he complained that "judges, jury and counsel can hardly keep awake sometimes because of the stifling atmosphere,"

he found that "the only way of ventilating this court is by opening a series of doors on the left of the judge causing a cold draught on one side of his face."—*The S.J.*, 1941, *p.* 7.

Fire in Bristol.—The flames which destroyed the old Crown Court at Bristol during an air-raid very fairly spared the new Civil Court, for that was put up five years ago to replace a building likewise burnt down, a structure of which MacKinnon, L.J., in his new book of circuit reminiscences, writes: "I do not remember that there is any reason to regret it." I wonder whether the great Sword of Justice, which hung on the walls of the Crown Court, perished. Ordeal by fire is nothing new for Bristol. The great riots of 1831 were among the fiercest popular outbursts these islands have seen, the old Mansion House, the Bridewell and the Bishop's Palace being burnt by the mob. In the result a Special Commission sat to try a hundred and two prisoners, but though eighty-one were convicted only five were hanged.—*The S.J.*, 1941, *p.* 7.

Hypothesis.—Among the many Saturday evening diversions provided by the British Broadcasting Corporation there recently appeared a parlour game called "Hypothesis", said to be "for the highly intellectual and the very serious folk, not forgetting those with a sense of humour". Those taking part were a lawyer, a scientist, a historian and an economist. The game consisted in putting a hypothetical question to each member of the group, and after some slight discussion the appropriate member of the group provided the answer. We trust that we are not unduly sensitive in detecting a good humoured "baiting" tendency in the question addressed to the lawyer, which was "What would be the state of society in this country if there were no legal profession?" In the course of the discussion the debaters arrived at the conclusion, somewhat startling to professional ears, that the golden age would have arrived simultaneously with the disappearance of the legal profession. It was a relief to hear that it was not a case of *post hoc propter hoc*, but only because mankind being perfect in a golden age there would be no need for either law or lawyers. Quite apart from golden ages, as the lawyer pointed out, there must be law in every civilised society, and a certain fifteenth century King who had tried to dispense with lawyers in his Parliament (called the "Unlearned Parliament") soon found out the difficulty of doing so, and the Parliament came to a quick end. He truly stated that the Workmen's Compensation Act was originally devised so as to be understood by everyone and therefore presumably to dispense with the need for any resort to lawyers, but in fact it had put more money into

the pocket of lawyers than any other piece of legislation. It might be added in respectful amplification of this important and little-understood point that the fault of disputing the meaning of ambiguous language lies at least as much with the litigant as with the lawyer. From the lawyer's point of view the best drafted Act of Parliament is one which contains the fewest possible of those ambiguities and vaguenesses which are to be found in abundance in the written and spoken language of the English and other literary people. That explains, to some extent, why parliamentary draftsmen have evolved a language which, though frequently baffling to the layman, and sometimes in its more involved passages to lawyers and judges as well, at any rate seeks to express definite and accurately ascertainable ideas through the medium of agreed words and phrases.—*The S.J.*, 1941, *p.* 50.

"*The Fifth Freedom*".—Every lawyer will appreciate the full value of what the Lord Chancellor termed "the fifth freedom" at the opening of a War Weapons Week at Kingston-upon-Thames on 24th January. He quoted President Roosevelt's recent reference to the four freedoms which every true democracy must seek to secure—freedom of speech, freedom from want, freedom from insecurity, and freedom from fear. The fifth freedom, said Lord Simon, was the freedom of every citizen to appeal to the Courts to protect him from injury and insult even though the wrong was committed by the misuse of official power. His lordship instanced the impossibility of applying for a writ of *habeas corpus* from a German concentration camp or suing the Gestapo for damages. Even in cases of detention under the necessarily stringent Reg. 18-B of the Defence (General) Regulations, 1939, applications to the High Court for writs of *habeas corpus* have been heard by the High Court. In *In re Sabini* on 20th January the Lord Chief Justice remarked on the importance in cases in which the liberty of the subject was involved of observing with scrupulous accuracy the provisions invoked. The mere existence of such remedies as the writ of *habeas corpus* and actions for damages for assault and false imprisonment is sufficient to deter any offender, official or otherwise, against, "the chartered right of Englishmen". This freedom, won as Blake said, "in many a glorious field," will be won on glorious fields again, and only then civilised society will be able to resume its progress towards the freedom from want, insecurity and fear which President Roosevelt put as the goal of every democracy.—*The S.J.*, 1941, *p.* 50.

[END OF VOLUME 1941—I.]

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THE LATE MR. S. SRINIVASA IYENGAR.

The death of Mr. S. Srinivasa Iyengar is an irreparable loss to the legal profession and has deprived it of a most brilliant lawyer and a forceful personality. Born in 1874 and enrolled as a High Court Vakil in 1898, he had the good fortune of being associated in the early days of his professional career with that great legal luminary, Sir V. Bhashyam Iyengar, and of coming into contact in the forensic field with other lawyers of eminence like Sir Sankaran Nair, Messrs V. Krishnaswami Aiyar and P. R. Sundara Aiyar and Sir K. Srinivasa Iyengar. From about 1907 he was easily in the first flight taking rank with the giants of the past. When still very young he read a paper on Hindu Law Reform which immediately impressed the profession and even public men outside as showing not merely the subtle mind of a practising lawyer but a man capable of deep thought on questions of sociology. When in 1916 he was appointed Advocate-General, though he was then the youngest Indian in our Presidency to hold that office, being but forty-two years old, it was recognised on all hands that it was but a fitting recognition of the stature that he had then attained at the Bar. A man of the most acute intellect and great learning, a quick thinker and tireless worker, he was one of our ablest lawyers of all time. For accurate and intensive learning, for deep and wide knowledge, for a keen and penetrating intellect — original as well as subtle — he had few equals and stood almost unsurpassed. Except perhaps during the last few years of his career at the Bar, there has been hardly any litigation of importance in this century in our Presidency, with which he has not been associated as an advocate for one side or the other. Whatever branch of the law he had to argue, whether it was a question of Hindu law or of trusts, or a question of property law or the construction of a code or a statute he was easily a *facile princeps*, compelling the admiration of his opponents and producing a powerful impression on the minds of all about his mastery of the fundamental principles

of jurisprudence and case-law. As an advocate he stood for thorough and conscientious preparation of cases, careful and cogent arrangement of facts, and mastery of even the most minute details relating to the same. His thoughts always outpaced his expression and he was frequently so far ahead of those associated with him in the case as regards the turn that could be given to any particular fact or to any suggestion from the Bench, that he used to grow impatient with them all. His mind was always alert and resourceful and his industry was something prodigious. Even after he had practically retired from the Bar, his services were availed of in a number of cases such as the Venkatagiri maintenance case and the Punganur adoption case. By his new edition of Mayne's Hindu law, a considerable part of which he has almost entirely re-written, he has laid the profession under a deep obligation. As President of the Madras Advocates' Association for a number of years, his advice and guidance were always helpful. He was a member of the Editorial Committee of Our Journal during 1912-1916 and the association is one that will always be cherished by us.

The lure of public life had always powerfully influenced Mr. Srinivasa Iyengar. But for it he might easily have found a place on the Bench of our High Court, if a preferment of that kind had been acceptable to him. In all his public activities since he relinquished the Advocate-Generalship in 1920, his vigorous personality often asserted itself but sometimes also led to clashes leaving his main objects and purposes unfulfilled. Only sixty-seven years old, Mr. Srinivasa Iyengar with his dynamic personality and wonderful talents was too young to die and it is matter for deep regret that his services should not have been available to us all for a longer period.

ANSWERS TO THE QUESTIONNAIRE

ISSUED BY

THE HINDU LAW COMMITTEE.

I. BY MR. T. R. VENKATARAMA SASTRI, C.I.E.

Part I: Question 1.—Which of these two alternatives, (whether the Centre should legislate with respect to property other than agricultural land at once making the law take effect from a date dependent in each Province on the date of the necessary supplementary provincial legislation, or whether the Centre should legislate and bring the law into force, leaving the Provinces to do whatever they think fit with respect to agricultural land) would you prefer? Or, would you prefer to have no Central legislation at

all until there are normal legislatures in all the Provinces? Or, have you any other suggestion?

Laws of succession must apply alike to all forms of property. There should not be one rule of succession to agricultural land and another rule of succession to all other forms of property. It is rather unfortunate that two different legislative authorities should be vested with the right to frame laws of succession to different kinds of property. The right to legislate resting, as it does, with two different legislatures, their agreement to the same scheme of succession is necessary before legislation can equally affect all property alike. And if the scheme of succession is to be applicable to the whole of India, that is to say, to all the British Indian Provinces, then all the Provincial legislatures have to agree to the Central legislature's scheme of legislation. A small point of difference between the legislatures that have to agree must hold up the legislation. A single legislature must have the power to frame laws of succession for all India so as to affect all forms of property. That of course assumes that public opinion all over India is keen on having one uniform law of succession for all Hindus.

As the Questionnaire points out, the legislature is not functioning in what might be called the Congress Provinces. Until the legislatures begin to function in those Provinces, this legislation cannot usefully proceed. If the Central legislature now passes a measure, and the Provincial legislatures or any of them raise objection later to any provision or provisions, the whole thing will have to be reconsidered. As things now stand, the only thing that one can say is that unless there is such clear unanimity of enlightened opinion as gives us fair hope of final agreement of all the Provincial legislatures, the present legislative effort might turn out to be so much wasted labour. It seems to me really very difficult to be sure of final agreement on the part of all the legislatures concerned to any scheme however widely supported by public opinion. That the scheme was evolved at the present juncture may itself prove to be an objection to it when it comes up later on seeking the approval of the legislatures.

The idea of a uniform law for All-India has now for a long time appealed to me as eminently desirable. If there was the smallest chance of all the communities agreeing to a territorial law, I should personally be willing to entertain the idea of departing from the Hindu law scheme of succession altogether. But there is not the ghost of a chance of such agreement. Our brother Muslims will not agree to depart from the Shariat law in any the smallest respect. A uniform territorial law for all communities being out of the question, a uniform scheme of succession applicable to all Hindus is the only

thing that can be considered, and this Committee is concerned only with that question.

Even in regard to this question, the first impression is that the Provinces are not yet ready to consider it. It is very doubtful whether the Mitakshara and the Dayabhaga can strike a middle line acceptable to the generality of people now under each system. It is less doubtful, but still doubtful, whether the differences between the Provinces in regard to the administration of the Mitakshara law can be surmounted in the present state of public opinion. In any case it is a matter in regard to which opinions may be gathered and the Committee will then be able to say how near we are or how far we are in regard to any such unification. As a first impression I may say that the unification of all the Provincial divergences in the administration of the Mitakshara may be feasible; unification inclusive of the Dayabhaga is more difficult.

My suggestion is that the question may be studied in the light of public opinion and if a unified scheme appears feasible a Bill may be got ready and published so as to elicit opinion in regard to it.

I am also of opinion that the legislation should be brought into effect at the same time in the Centre and in the Provinces by parallel legislation and it must therefore wait until such time as all the Provincial legislatures are in a position to assist in the framing of a scheme acceptable to all concerned. It will not do to legislate in respect of all property other than agricultural land, leaving the provincial legislation as to agricultural land to a later time.

Question No. 16.—Which, if any, of these alternatives, (namely, whether with a view to avoid piece-meal legislation every Hindu should be empowered to make a formal declaration before a prescribed authority that his property should devolve according to Hindu law, in default whereof the property was to devolve according to the Indian Succession Act, or whether power should be given to make a declaration that the Succession Act shall apply failing which the property was to devolve under Hindu law, or whether the rules of the Succession Act or a set of rules representing the greatest common measure of the rules of succession in the various schools of Hindu law should be made applicable to all Hindus, after a specified date) would you prefer? etc.

The growth of a uniform system of law cannot be promoted by an option given to each individual to choose as between two schemes of succession.

There are laws of succession. There is a law of wills, within limits giving to individuals the right to determine the devolution of their property. Broadly speaking, the intestate law of succession

represents the general sense of the community as to the presumable preferences of the individuals of that community as to the devolution of their property. Subject to such restrictions as the law imposes on testamentary dispositions the individual is allowed to alter or set aside the line of succession according to his choice. That more than a third should not be disposed of by will, or that a member of a joint family shall not dispose of joint family property by will, or that the devolution shall not be controlled beyond a certain point of time are all illustrations of the restrictions which the law imposes on testamentary disposition.

Is the choice of the Indian Succession Act or the Hindu Law anything like the exercise of the power of making a will? Is it revocable? I think not. It is a choice once for all. The power of executing a will is still there to help him if he should regret the choice made. If each man or woman is given this option, then husband and wife, father and son, and mother and daughter, may choose different ways. Is it intended that subsequently born children should be bound by the parent's choice of the law of succession, as he may be by the parent's change of religion? What is to happen if the mother and the father had chosen differently. Does the son follow the father, and the daughter the mother? Apparently it is hoped that at some time all will have chosen the Indian Succession Act. As far as I can see the suggestion seems to be individual choice for all men and women in each generation. If I am right in that assumption, I see nothing but appalling confusion as the result, however unintended. In any case I am clearly of the opinion that this is the worst possible approach to the securing of a uniform law of succession for all Hindus.

Neither option stated in the question is acceptable to me. Many people would feel repugnance to a course which involves throwing overboard our own laws of inheritance and agreeing to adopt instead a wholly different law of inheritance. I must myself confess to a similar feeling in accepting the scheme of the Indian Succession Act in supersession of the Hindu law however much the scheme of the Indian Succession Act might be otherwise acceptable. The only proper solution is to weave into our own laws of inheritance such changes as new and changing circumstances and conditions of our time might seem to demand.

The changes that might be made and the principles that might be accepted as the basis of those changes I shall put down separately.*

They can be taken into consideration only after the Committee has decided whether to embark upon the scheme of unified legis-

* See the Tentative proposals *infra*.

lation and if so to what extent unification should be attempted in immediate legislation.

TENTATIVE PROPOSALS.

If the Mitakshara and the Dayabhaga are to have a unified scheme of succession the following suggestions are worth consideration :—

Right by birth of the Mitakshara system should be made applicable everywhere.

Survivorship is to be abolished except in the case of an unmarried minor's death without division of his share in his lifetime.

Agnates and cognates are to be shuffled in on the principle of propinquity or religious efficacy as in Bengal Dayabhaga.

Female heirs who are related by blood connection with the propositus should have absolute estates as in Bombay and the female heirs who enter the family of the propositus by marriage are entitled only to limited estate.

Note : The Dayabhaga may not agree to the right by birth. The Mitakshara may not agree to the cognates being shuffled in among the agnates. The daughter and the daughter's son though cognates came in on a peculiar history of their own. What the *appointed daughter* originally obtained by the *appointment* has now been extended to the case of daughters and daughter's sons who are "even as the son and son's son." The recent introduction of the cognate descendants and the sister and her son among the agnates has already cut into the Mitakshara preference of agnate claims. The Mitakshara has also lost the right of survivorship in recent legislation in the case of the new heirs introduced.

A scheme of succession discarding the preference "of the near to the remote" of the Hindu law and approximating to the rule of distribution as in the Muslim law or in the Indian Succession Act has already emerged in recent legislation. In the conditions of our time and in the agitation for the recognition of women's rights that trend is inevitable. Nor is it wholly alien to the spirit of earlier Hindu law which allotted shares on partition to the mother, the son and the daughter. In the devolution of separate property as distinguished from the devolution of joint property, the principle of nearness exclusively held the field and that is now being attacked and sought to be modified.

If the Dayabhaga could allow the introduction of right by birth, if the doctrine of survivorship associated with the right by birth could be accepted in the modified form put down above by the Mitakshara and the Dayabhaga alike and if as to woman's estate the distinction between those connected by blood and those connected by marriage could be accepted in all the Provinces a unified scheme of succession

will be possible. Each Province will have contributed to the scheme and each Province will have given up part of its principles for the effecting of the necessary compromise. I am not wholly clinging to any of these items as an absolutely necessary condition for the unification. If other suggestions are made, I am willing to consider them. Unification is worth some sacrifice on the part of every one. It is not possible without "give and take."

Questions 2 *to* 5.—These questions relate to what ought to be the respective position and rights *inter se* as between a widow, widowed daughter-in-law or grand daughter-in-law and a daughter for purposes of succession to the property of a deceased Hindu. They expose the incoherence and lack of principle in the provision for the daughter-in-law and the grand daughter-in-law in the provisoes to section 3 (1) of Act XVIII of 1937. In contrast to them, the provision in section 3 (2) is not without support in the principles of Hindu law. Survivorship left the widow with only maintenance. If survivorship is set aside, she may well succeed *to her husband's share* for life as a full provision for her maintenance. While heirship to the husband is nothing new or unnatural, heirship to the father-in-law is an innovation on no principle known to the Hindu law. The result of such innovation is a crop of problems the solution of which cannot be based on any principle.

Joint family property is divided among those entitled to benefits out of it. Some took shares and others maintenance. Even the share was only maintenance where a female heir took it. The separate property of a person is not divided among the near relations but taken by them in the order of nearness. The widow, mother, grandmother, daughter, sister did not take together, but widow, daughter, daughter's son, mother, grandmother and sister took in succession. If a daughter-in-law is to be a sharer with son, grandson and great grandson, how can these be ignored?

So far as the expansion of women's rights is concerned, the provision of a daughter's share along with the son of the one-fourth of the law-givers or one-third, not more than a half, is sufficient. Every daughter-in-law is a daughter in some family and she will take her share there. The succession to the estate of one who leaves sons and daughters and a widow may be fixed by giving one share to widow, one share to each son and the fractional share fixed for a daughter. (I am proposing later that the widow's share should be a life estate and the daughter's an absolute estate.)

If I go on to deal with the questions 2 to 5, I have but two objects to show how difficult it is to provide a logical solution and how you are driven to the repeal of the two provisoes as the least that is required to put things straight.

Now a daughter-in-law cannot be placed on any higher footing than the daughter. If the daughter-in-law is to be admitted to a particular share, the daughter will have to be admitted to at least the same share. If the daughter-in-law is admitted to a share along with the son (that is, her deceased husband's brother), the daughter must also be admitted to a share along with the son. The daughter had a share under the Hindu law at one time, though it has now become obsolete everywhere. The process by which it became obsolete may be readily visualised. It was at first deemed a provision for maintenance and marriage. The text easily lent itself to that construction. Therefore those already married were cut out as having had their share. Then the unmarried were deemed entitled only to a similar provision. If they were maintained and married, they cannot ask for a share in addition. There are other cases in which a previous provision is treated as liquidating *pro tanto* claims that arise later. One may perhaps add to this the latter-day consideration that the marriage expenses of girls in the result proved not merely as the allotment of the due share but complete pauperisation of the family. Further allotment may not justly be due in such cases. In fact one may well apprehend that the allotment of a definite share might reduce the concern of the brothers in getting her duly married. Nevertheless if the daughter-in-law's share is to be retained the daughter must be allotted a share. This allotment to a daughter, at any rate, is not an unprincipled innovation, but the restoration of an old law in a somewhat extended form. One-fourth share was the ancient rule. If that is the share that the daughter takes with the son, the daughter-in-law can be allowed to take no more. To allow her an equal share with a son and to allot less or nothing to the daughter is to promote fiction to a higher level than fact.

Now I take up the questions 2 to 5, each in its turn.

Question 2 : What would you desire to be the position as between the widowed daughter-in-law and the daughter, (where a Hindu dies leaving these relations only)?

In the case given the daughter is the heir under the Hindu law. The daughter-in-law was no heir. At best she had a right to maintenance from the father-in-law's separate property. Curiously the Act XVIII of 1937 gets rid of the daughter as heir and puts the daughter-in-law in. As I said, reality is here ousted by fiction. This illustrates how benevolence rooted in sentiment and not in reason might throw a well-knit system out of order.

On the provisions of the Act for the daughter-in-law and grand daughter-in-law being retained the only suggestion that one can make is that they should take equally. The daughter-in-law and

the grand-daughter-in-law, if they belonged to one branch of the family, can only take together a daughter's share. The daughter being the real heir and these other relations being new introductions and their allotments coming out of the daughter's share, I make the suggestion that these others should have their shares for life with remainder to the daughter and her heirs. It is a part of her property temporarily subtracted from it and falling into it again when it has served the purpose of maintaining the life tenants.

If instead of daughter there was mother or grandmother or sister the same principle is to be applied. The legal heir is the owner of the whole, the shares allotted to the others are to be life-estates with a vested remainder to the heir from whose share these are subtracted for the maintenance of the new sharers.

Questions 2 (a) *and* (b) : Should there be different rules according as the daughter is unmarried or married, rich or poor ? Should a daughter who is a widow without male issue be excluded ?

No difference need be made between married and unmarried, rich and poor, widow with or without children.

Question 3 *:* This question relates to what ought to be the position where a Hindu dies leaving a widow, a widowed daughter-in-law and a daughter.

One view may be that the widow is the legal owner and that the daughter-in-law takes a share with the remainder vested in the widow. After the mother both rights pass to the daughter. This solution has a certain illogicality in it. It might be put in two ways. If a son is there, it was suggested that a share should be given to the daughter also. That share should be given even if there is no son. In fact a larger share should be given in the absence of a son. And it may also be said that the daughter should not be excluded when the daughter-in-law is given a share.

The preferable solution is to give the mother a son's share and to the daughter and the daughter-in-law each a quarter share (or the fraction fixed) as our principle was to put the latter no higher than the former. Of course in due time all the property will pass to the daughter and further devolution depends upon the character of the estate which we allow to a daughter dealt with later on.

Question 3 (a): When a Hindu dies leaving only a widow and a daughter, should the daughter take equally with the widow exactly as a widowed daughter-in-law would do under the above Acts ?

My previous answers involve one-fourth or one-third to the daughter and a full share to the mother as in the case of the son.

Question 4: A Hindu dies leaving a widowed daughter-in-law, a son and a daughter; what would you desire to be the position as between these three in such a case?

The answer to this is already expressed. The son takes a share; the daughter and daughter-in-law take each a quarter share or the share fixed.

Question 5: (Assuming that the daughter is to be put on the same footing as the widowed daughter-in-law, which arguably is the same as that of a son in regard to the separate property of the deceased owner) should this be done in all circumstances, even when there is a surviving son of the deceased, or only in certain defined circumstances?

S. 3 (1) of Act XVIII of 1937 applies only to separate property; S. 3 (2) to joint family property. This is answered in the last question. Equality in the absence of a son or mother and in their presence one-fourth or other fixed fraction of the son's share for each.

Question 5 (a): When a Hindu dies leaving only a son and a daughter, should the daughter take equally with the son exactly as a widowed daughter-in-law would do (under the Act of 1937 as amended in 1938)?

The daughter takes a one-fourth share, if we are restoring the old fraction exactly. As we are reconstructing it anew we can fix the fraction as we like. Instead of one-fourth it may be fixed at one-third. As we are extensively cutting into the son's share according to the scheme of Hindu law, I am not suggesting equal shares for son and daughter.

On the last unnumbered question after 5 (a) concerning cases of the mother and other relations I have answered it under question 2 for the case in question 2. In question 3 if the competitors are widow and mother unless the mother comes after the widow, as under the Hindu law, they can only be made to rank equally.

I MUST CONFESS THAT THERE IS NO PRINCIPLE ON WHICH A DAUGHTER-IN-LAW OR A GRAND DAUGHTER-IN-LAW IS ALLOWED A SHARE WITH THE SON AND A MOTHER OR GRANDMOTHER OR SISTER GETS NO SHARE. AND IF A SHARE IS TO BE PROVIDED AT THE SAME TIME THERE IS NO REASON FOR LESS THAN EQUALITY BETWEEN WIDOW, MOTHER AND GRANDMOTHER. AND HOW IS THE DAUGHTER-IN-LAW NEARER OF KIN THAN A SISTER?

All the above suggestions are arbitrary and all are proofs that the daughter-in-law's introduction as an heir to the father-in-law is the source of all the confusion. If the daughter-in-law is heir along with the widow, how can a mother or grandmother or sister be excluded? The cutting out of the daughter-in-law is the neatest

solution. If shares are provided for the daughter it will serve every woman who must be a daughter in her own family. If a share is to be given to a woman who has entered into another family she may have a share as a widow or mother or grandmother. If these are provided, the expansion of woman's rights will be secured amply without sacrifice of principle or logic.

Question 6 : Where a Hindu dies leaving a widow and an adopted son should the former take the same share as a son born to her after the adoption or the same share as the adopted son ?

The widow and the adopted son should take equally. It is only when there is a subsequently born aurasa son the adopted son is reduced in status and in share according to the Hindu law ; and *then* on a partition the mother has equality with the aurasa son. Until an aurasa son competes he is equal to an aurasa and on that basis is allowed even collateral succession on the adoptive father's and mother's sides. If an aurasa son is born and dies without a son or a widow the position is the same, the mother and the son take equally. It is possible to suggest in this case that the mother should take the share of an aurasa son on logical grounds.

Question 7 : Where a Hindu dies leaving only a widow and she later on adopts should the adoption divest the widow of the entire estate or only to the extent of one half of the estate ?

Even in this case the adoptive mother and the adopted son take equally. How can fiction be placed on a higher footing than fact ? The adopted son has under the law the same legal rights in his father's estate as he would have had if he had been born on the date of his adoptive father's death and in fact considerably less because the will of the father would prevail as against him. In any case he can have no higher right than a son born after the father's death.

Question 8 : (Where a Sudra dies leaving a widow and a dasiputra) should she inherit the same share as an ordinary son or as the dasiputra ?

Under the Hindu law an illegitimate son of a Sudra gets an equal share with a widow, or a daughter, or a daughter's son. Why alter it ? The text is : "*Abhratrko haret sarvam duhitrnam sutadrte*," which posits that an illegitimate son by himself takes the whole in the absence of a daughter's son.

Question 9 : (Where a Hindu dies leaving a widow and a son of an anuloma marriage) should the widow inherit the same share as an ordinary son or as the son of the anuloma marriage ?

The customary law as to sharing may be maintained. The widow will inherit the same share as her son would have taken.

Probably equality between the widow of one caste and the anuloma son of another caste may be juster for the reason that the widow's share is a newly created one.

Question 9 (a): Should any provision be made to place the legality or otherwise of anuloma or other inter-caste marriages beyond doubt?

I think this may be left to custom. So far as marriages under the Civil Marriage Act are concerned they are not governed by the Hindu law and no question arises of the caste of the parties who enter into the marital relation, or of anuloma or pratiloma marriages.

Question 10: Where a Hindu dies leaving two widows and a number of sons should the position created by the Acts be maintained?

If the Hindu law gives a separate share to each widow, I do not see why it should be altered.

There was an old law that the superseded wife should be given one-third of the husband's property. I suppose the principle to be that even though there is ordinarily no division between husband and wife, yet when the husband puts her aside she must be given her share and one-third is fixed there being a husband and two wives. There is much to commend this old rule. This is however by the way. The answer to the question has been already given.

Question 11: Where a Hindu dies leaving widows of different castes should all the surviving widows take equally irrespective of caste? If not what rule would you prescribe?

The shares of the widows should be the same as their respective sons would have taken under the Hindu law. These cases are rare. They will not occur if monogamy became the rule. It is for theoretic completeness rather than the solution of an actual case that this rule is laid down.

Question 12: As to the effect of conversion or unchastity of or remarriage by any of the widows referred to in the Acts of 1937 and 1938 what provision should be made for each of these contingencies?

Where nothing is said as to any particular matter the Hindu law will remain. The Act should so state the law. It should be enacted: "Except in so far as this or any other Act has amended the Hindu law, the Hindu law remains in full force and effect."

Question 13: What express provision, if any, should be made for the devolution of the estate upon the death of any of the heirs provided for in the Acts in question?

In regard to the newly created estates, they are to be life estates with vested remainder to the heir under the Hindu law from whose rights these are carved out. As regards the old limited estates they remain as before and pass to the heir of the previous male owner at the time the life estate terminates.

I am inclined to adopt the Bombay rule of life-estates to women incorporated in the family by marriage and absolute estates to the daughters of the family and to all blood relations.

Question 14: What remedy, if any would you propose? Would you provide for (*a*) a limited estate in every case as under the Acts in question, or (*b*) an absolute estate in every case, or (*c*) an absolute estate in a certain specified share of the inheritance, such as one-sixth, or (*d*) the same kind of estate whether limited or absolute, as the widow would have taken under her own personal law but for the Acts?

This is answered above.

Question 14 (a): Do you consider that any special provision should be made for women in families with impartible estates or would you extend the same rules to them as may be formulated in the case of ordinary estates?

The estate being impartible only maintenance can be provided. Otherwise succession to these estates may be left to the already established law of primogeniture.

Question 15: (What position would you wish to see established regarding the respective rights of parties) where a Hindu governed by the Mithakshara school dies, leaving a widow, a mother, and a brother, all members of a joint family?

There is to be no survivorship as between the son and the widowed daughter-in-law. If there is to be, the mother will have it just like her husband, the father. No principle can suggest any other solution than that the son's share goes to the mother.

The source of all our difficulties is the mistake in Act XVIII of 1937 that the widow is not merely to step into her husband's place *at the moment of his death* but that on every future occasion when succession opens in the family she should share as if the husband survived in her. If that view is taken one may ask why not she be allowed to succeed to collaterals just like her husband? The principle of treating her as if the husband survived in her can be applied if at all only to prevent escheats and not to give her rights in the presence of preferential heirs.

Part II: The Bill* provides for separate residence and maintenance of the wife of a man, in cases falling under one or other of the seven grounds referred to in the Questionnaire, namely, (1) if the husband is suffering from leprosy, or any loathsome disease; (2) if the husband is suffering from venereal disease; (3) if the husband is an incurable lunatic; (4) if the husband is guilty of cruelty towards the wife; (5) if the husband deserts the wife; (6) if the husband marries again; or (7) if the husband turns a recluse or changes his religi n. The Bill enables the wife to institute a suit, but it is very doubtful whether in any but an infinitesimal class of cases, a woman will take advantage of the Act.

Of the seven grounds mentioned, I agree that legislation may give right to the wife to claim separate residence and maintenance in cases covered by grounds (1), (4), (5) and (7). As pointed out in the Questionnaire we shall practically be giving legislative sanction to what has been decided by the courts in those cases.

I hesitate to make venerea ldisease a ground of separation, unless it develops into a loathsome disease.

An incurable lunatic may, in the nature of things, require somebody to protect him and his property. The wife will, in many cases, have to take charge of the property and the person of the lunatic.

The second marriage of the husband may have been promoted or agreed to by the first wife. In such cases it may not be right to allow the wife to claim separate residence and maintenance.

I think that the better course is to retain the clear cases mentioned in grounds (1), (4), (5) and (7), and provide a further residuary clause enabling the courts to grant separate residence and maintenance in other cases in which it deems just and reasonable to provide separate residence and maintenance.

As to the question; "Should the law be made more precise, *e.g.*, by enacting that the marriage of a person who, from unsoundness of mind, is unable to understand its nature or meaning is null and void?".

I see no great advantage in enacting that the marriage of a person who from unsoundness of mind is unable to understand its nature and meaning is null and void. As a proposition, I understand, it is law even now; but, every time, the question will be, whether the unsoundness of mind in each particular case is of the description mentioned.

* Dr. Deshmukh's Hindu Married Women's Right to Separate Residence and Maintenance Bill.

The second question is : "Has the time arrived for making a law that in future a subsisting marriage shall nullify any subsequent marriage of a Hindu?"

Enactment prohibiting bigamy is not feasible. Let us take the case where it is not the husband but the wife that is suffering from leprosy or any loathsome disease, or is an incurable lunatic, or changes religion. In such a case, should the husband have permission to contract a second marriage? A second marriage of the husband for want of issue or male issue is sometimes promoted by the first wife herself. Having regard to these cases, a prohibition of a second marriage during the subsistence of the first is not, even now, desirable.

Where a second marriage is just in given circumstances, law may prohibit bigamy only by providing for divorce. From the standpoint of the wife suffering, say, from a loathsome disease, the permission to contract a second marriage is less unjust or inconvenient to the wife than granting a divorce and depriving her of all protection in the shape of residence and maintenance.

Question 3 is : "Do you consider that the Bill should provide separately for decrees of nullity and decrees for separate residence and maintenance? If so, what should be the grounds for each?

On the view I take, question 3 does not arise. But if invalidity of marriage on the ground of unsoundness of mind is enacted, the provision suggested by this question will become necessary.

The next question is whether there should be a declaration by law, that a marriage shall not be invalid merely because the parties belong to the same gotra.

Sagotra marriages take place in some parts of the country. The cases where they occur with the support, it might be supposed, of local cutsom, are very few. Local conditions must have forced it on the population. The prejudice against such marriages is deep-seated and cannot easily be eradicated. Belonging as I do to a gotra with the largest number of adherents I confess to a feeling of repugnance to sagotra marriages. I do not expect that a very large number of persons will take advantage of the freedom given by legislation. I have, however, no objection to the legislature taking off the prohibition under the Hindu law.

Question 4 relates to the necessity of desirability of having separate courts of summary jurisdiction to deal with matrimonial problems.

If we are going into legislation in regard to the relation between husband and wife, the English system of having separate oourts of summary jurisdiction for domestic proceedings is desirable.

Question 5 is directed at the desirability or otherwise of fixing a minimum proportion regarding maintenance payable to a wife on separation.

The quantum of maintenance should be left to the courts. It is not the minimum but the maximum that should be fixed. One-third of the property or share of the property of the husband should be the maximum that may be awarded by way of maintenance. Subject to that maximum, the quantum of maintenance should be left to the discretion of the courts to be exercised on a consideration of all the facts and circumstances of each particular case.

As to question 6, whether the wife should be given the right to separate maintenance if the husband is living in adultery, I am not in favour of a specific provision of the nature indicated. This case can, if the court thinks fit in any particular case, be brought under the residuary clause that I have suggested above.

It is incidentally remarked in the memorandum that "it may also be necessary to add detailed provisions regarding procedure, the effect of an order for separate residence on the property or other rights of the wife, etc., e.g., whether property "acquired by her after the order by her own exertions is to be her absolute property or not."

I take the view that property acquired by a woman by her own exertion belongs to her under all circumstances. It is her property whether acquired before or after an order for separate residence and maintenance. This I take to be the settled Madras view. It may be made an all India rule as far as my opinion goes.

*Part III:** *Question 1*: Whether the term sister in Act II of 1929 should be construed as including the half-sister, I should think that the term "sister" might not include the half-sister, but half-sister should be specifically added after the sister.

Question 1 (a): This relates to the position that should be accorded to a half-sister in the presence of a sister. The half-sister should take after the full sister.

Question 1 (b): If the only surviving heirs are a half-sister and a full sister's son, should the full sister's son take before, or after, or with the half-sister?

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* This concerns Mr. Santanam's Hindu Law of Inheritance (Amendment) Bill, seeking to interpose the son's daughter's son, the son's son's daughter, the daughter's son's son, the son's daughter's daughter and the daughter's daughter's son between the daughter's daughter and the sister in the line of heirs, and to add the sister's son's son as heir after the sister's son.

Full sister's son and half-sister should take together; so it seems to me.

Question 2. (Do you consider that the sister should be postponed to (the five heirs proposed to be interposed by the Bill between the daughter's daughter and the sister)? And what should be their order *inter se?* Do you consider it necessary to add the sister's son's son after the sister's son and before the father's brother?

Now that we think of admitting son and daughter, these cognates may well take together if they are related in equal degrees, the male and female heirs taking the shares of son and daughter respectively. If that is not acceptable, the order, on principles of Hindu law may be (1) the son's daughter's son, (2) the daughter's son's son, (3) the daughter's daughter's son, (4) son's son's daughter, and (5) son's daughter's daughter.

Sister's son's son may come in after the sister's son and before the father's brother.

I do not attach much importance to any particular suggestion except as an exercise in Smriti logic. The testator can always make a will changing the line of succession.

II. By a Religious Head*

Introductory :—

Every system of inheritance has a philosophy of social aims behind it. A Hindu should desire his property to devolve according to the ancient Hindu law of inheritance. The property of a deceased Hindu which passes with full ownership to another is known as *Daya*. All relations are not entitled to *Daya*. The object of allowing property to devolve is not merely the physical maintenance of those who take the inheritance. If it were so, a limited uniform provision may be made for all relations of the deceased alike, and the rest of the property disposed of otherwise. But the Hindu law rests upon a definite system. There are some members who are entitled only to proper maintenance from the assets of a joint family, or of a deceased Hindu. A Hindu desires that his descendants should keep up the high spiritual ideals and that the members of his family should continue to live the same mode of life, with the same *acharas* and beliefs, which his ancestors did. All members are to be provided with proper maintenance, so that they may maintain the family traditions, culture, and *achara*. They will not be able to do this properly, if they are left in want. Only some relations are declared entitled to inherit the *Daya*. The person who is entitled to the *Daya* takes it though it may be more than what is needed for his maintenance.

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* H. H. the Jagatguru Sri Sankaracharya Swamigal of Kamakoti Pitham.

In return for taking the *Daya*, he is bound to offer *Pinda* or *Udaka* to his ancestors both immediate and remote. If the ancestors go without such *Pinda* or *Udaka* they are deprived of the legitimate spiritual benefit which they expect from their decendants. It is the duty of the person taking the *Daya* to prevent such a happening.

2. If a person takes the *Daya* who is not qualified to offer *Pinda* or *Udaka*, such taking would be an improper appropriation. No Government should allow such improper appropriation to take place. The Government would be acting without principle, if it allows such wrongful appropriation, in the name of Hindu law. Persons who have no such beliefs have no right to be called Hindus, and there can be no objection to their having their own rules of succession, which cannot be any part of Hindu law. It is also the duty of the persons who take the *Daya*, to sustain and to continue the traditions and the ideals of the ancestors whose property they take. Any new set of rules which disregard the above principles cannot be good and proper. The innovations made by the Acts of 1929, 1937 and 1938 will have the effect of allowing a large part of the joint family assets of Hindus to reach the hands of new heirs, who are not only not qualified to render the spiritual benefits to the ancestral line, but are enabled to take their portion without the corresponding responsibilities and obligations which have attached hitherto to the assets in the hands of the male heirs. Such obligations are numerous and include (i) the discharge of family debts, (ii) marriages of sisters and daughters of the family, (iii) the performance of various religious ceremonies (Samskaras) for all the members of the family whether male or female, (iv) maintenance of members of the family, (v) expenditure which has to be incurred in respect of the sisters and daughters of the family, who by tradition are to be invited and supported in the family until they have become mothers of two or three children, and similar other obligations.

3. The system of Hindu law is a homogeneous whole, and any tampering with it in any one place will have the effect of dislocating other parts of it. The main purpose of the new proposals is obviously to provide for women who may be neglected or uncared for by even their near male relations on account of modern conditions. But the new status and the new provisions made for them may produce results quite the opposite of those intended. They may cause the women to lose their family affections, and tempt them to live aloof. As a result, Hindu families will lose the beneficial moral and spiritual influence which women now exercise within every ordered Hindu family. In addition, it is likely that women with large assets in their hands and with no family responsibilities, are apt to be deceived by others and made to lose their assets, and ultimately the purpose of the new legislation may be frustrated. The ancient Hindu law

had made provision for such contingencies. For instance, the brother is enjoined to provide a 1/4th share of his income to a sister left without provision. The brother who does not make such provision becomes a *Pathitha.* The Pathitha loses his right to retain the share of his property.

4. The Acts of 1929 and 1937 and other similar legislation now proposed, all tend to affect vitally the hitherto established Hindu law relating to joint family and inheritance. The results of such legislation cannot but be injurious. Any tampering with the old rules, which are marked by comprehensive wisdom and foresight and have stood the test of time, will only result in producing confusion. It has been disclosed that the Act XVIII of 1937 is defective, ambiguous, and ineffective. (Vide paras 588 to 593, Srinivasa Iyengar's edition of Mayne's Hindu Law). Similar untoward results will follow if fresh legislation is undertaken to alter the Hindu law of joint family and succession.

5. For the above reasons we are of opinion that Hindu law should have been left as it was. We are opposed on principle to the changes introduced by the Acts of 1929, 1937 and 1938. Therefore, on principle we need not give any answers to the Questionnaire except to state that all the innovations proposed by them are uncalled for and unnecessary. But yet we have set forth the answers to the several questions from the viewpoint of preserving the rules of Hindu law according to the Smritis.

Question (1) : As to the manner in which legislation is to be made, there is no need for Central legislation. It is not desirable to have two systems of succession and partition, one for agricultural land and another for other kinds of property, as that would lead to numerous complications, and throw the whole system of inheritance and partition into confusion.

Question (2) : This concerns the case of the daughter. The right given to the widowed daughter-in-law by the Act XVIII of 1937 was a wrong innovation. According to the Smritis, if there is no widow and there are only a widowed daughter-in-law and a daughter, it is the daughter that should get the inheritance. By the Act of 1937 the widow and a widowed son-less daughter-in-law share equally. It may now be provided that the daughter, if there is one, should get the inheritance after the daughter-in-law. To this extent at least the former rule of inheritance may be made to prevail.

Question (2) : *Sub-question* : Where the daughter is to get the *Daya*, the preference or exclusion in regard to daughters by reference to their being married or unmarried, rich or poor, or having male issue or not having male issue, having been laid down by the

various Nibandhanakaras on the subject of succession by daughters may be adopted.

Question (3) : As to the relative positions of a widow, widowed daughter-in-law and a daughter, in such a case, by the rules of the Smritis, the widow alone will be entitled to retain the inheritance. The daughter-in-law will be entitled to maintenance, and the daughter if unmarried, is to be married at the expense of the family assets.

Question (3) (*a*) : The question is whether a daughter can take equally with the widow. The answer should be that the daughter can take only after the widow's death.

Question (4) : As to the position *inter se* between a son, a daughter and a widowed daughter-in-law, the son alone should take the inheritance, and not the daughter-in-law or daughter. After the widow, the daughter will take as per the Smriti rules.

Question (5) : If there is a surviving son of the deceased, such son alone should take the inheritance.

Question (5) (*a*) : When a Hindu dies leaving only a son and a daughter, the son alone should take the inheritance.

Supplementary Question (3) : When there is the widow and the mother of the deceased, the widow alone is entitled to the inheritance.

Supplementary Question (4) : When there is the widow and the father's mother of a deceased, the widow alone should take the inheritance.

Supplementary Question (5) : When there is the widow and a sister of the deceased, the widow alone should take the inheritance.

Question (6) : The adopted son should take the inheritance after adoption by the widow.

Question (7) : On adoption by a widow, the entire estate will be divested from the widow and should vest in the adopted son.

Question (8) : The *Dasi putra* will by the rules of Smriti take the entire estate.

Question (9) : As *Anuloma* marriages are prohibited, the widow should take the estate in preference to the son of an *Anuloma* marriage. In those localities where *Anuloma* marriages are recognised the law prevailing there may be followed, and the *Anuloma* son may take to the extent that he is permitted.

Question (9) (*a*) : No provision need be made for permitting *Anuloma* or other inter-caste marriages, as such marriages are against the Sastras.

Question (10) : Where the deceased has left a widow and a number of sons, the sons should also allow a share to the widow. Where there are two widows, each should be given a share like a son,

Question (11) : In cases of there being several widows, but not of the same caste, the widows may take the shares as their respective sons would have taken, that is, the mother of the *Anuloma* son taking less, in the same manner as the *Anuloma* son himself.

Question (12) : The widow in any one of the three cases, *viz.*, unchastity, remarriage, or conversion to another religion, should be disqualified from taking the inheritance.

Question (13) : On the death of the widow, the inheritance should go to the daughter, if any, and in default of the daughter, to the other heirs according to the Smritis. On the death of the daughter-in-law, the estate should go to the son if there is an only son. But if there are more than one son, the portion left by the daughter-in-law should on her death be divided among the sons and the widow (their mother).

Question (14) : The estate to be taken by the heirs created by the new Acts must be of the same kind, limited or absolute, as is prescribed in the Smritis according to the various Nibandakaras, (*i.e.*,) absolute in those localities where it was formerly absolute, and limited under those schools where it is limited.

Question (14) (a) : The Government may undertake suitable legislation for women in families with Impartible Estates. The ordinary law should not apply to them.

Question (15) : The widow should not be deemed to be a member of the co-parcenary exactly as her husband, for purposes of applying the rule of survivorship among co-parceners. It may be provided that the widow will have the same interest as her husband would have obtained if he had become separate from the co-parcenary immediately before his death.

Question (16) : The question relates to the desirability of every Hindu making a declaration to a competent authority choosing the rules of the Indian Succession Act or Hindu law, by which the devolution of his property is to be governed. The proposals in the three paras of this question amount to a stigma on Hindu law and an insult to Hindu society. The natural and ordinary rule that the member of every community should be governed by the personal law prevailing in that community shou'd always hold good.

The proposal that rules of Hindu law should apply only if a prior declaration desiring their application had been made, is uncalled for, and designed ultimately to disintegrate Hindu society and destroy Hindu law. The making of a new table of heirs is unnecessary, being opposed to principle, expediency, and the fundamental need for reverence and loyalty to the past, which every community desiring stability and strength should never fail to observe.

Part II:—

Part II of the Questionnaire relates to providing remedies for hardships which a wife may suffer from circumstances attributable to the husband. Their object is to ensure the woman's happiness as an individual, in spite of adverse circumstances. Social rules are intended to secure the welfare of society as a whole. The working of any system of social rules will involve the sacrifice of the interest or happiness of some individuals. But this is only for the purpose of achieving the larger welfare of society. Individuals should accept the hardships and sufferings incidental to social life (*Samsara*) as steps in the path of moral and spiritual progress.[1] The alteration of social rules with a view to remove hardships in some cases, may result in producing more suffering than before and injuring society as a whole. Hindu law is founded upon the revealed Vedas. The Vedic law has regard to the welfare of all creation. Man-made laws have regard to the happiness of individuals or particular groups. They change when the people's desires, or the desires of those who rule over them, change. But the law whose source is the Veda, cannot be changed to suit man's changing standards or whims. Its applicability stands valid for all time and for all men.

The Hindu social system is based on caste-life and family life. The maintenance of hereditary castes is essential for the performance of the duties to the *Devas*, who in return shower their blessings on mankind. The maintenance of family life with pure and unbroken descent from generation to generation (*Kula*) is necessary for fulfilling the duties to ancestors (*Pithrus*) which the Vedas enjoin. A Hindu householder has to perform all religious duties to the *Devas* or the *Pithrus*, only with his wife by his side.[2] These considerations have placed women in an exalted and protected position in Hindu families.[3] The *Rishis* lay down that a woman should live under the protection or care of the father, the husband, or the sons, or with the family of *Gnathis* (agnatic relations of the husband), but should never live alone.[4] The *Smritis* have enjoined that women should be treated with the utmost honour, and most solicitous regard shown for their personal welfare.[5] They prohibit the leaving of a wife abandoned and helpless, even if she is guilty of gross misconduct.[6]

As the main aim of the proposed legislation is to give rights to Hindu women to claim separate residence and separate maintenance, it is opposed to the fundamental spirit and aims of Hindu Law.[7] The "grounds" enumerated in the Bill for a wife

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1. Manu I—26. 2. Manu VI—36, IX—96.
3. Manu IX—25 to 28. 4 Manu IX—3, Yajnavalkya I—85, 86.
5. Manu IX—7, 55, 56, 95, III—59 to 62; Yajnavalkya I—71, 78, 82.
6. Yajnavalkya I—72, Mitakshara I—72.
7. Manu IX—45.

claiming separation have no reference to normal conditions, but only to rare instances. The Courts are even now able to render justice in most such cases. We can state that there are provisions in the *Smritis* to cover all cases where relief should legitimately be given.[1] There is no need for special legislation. The consequences of the proposals made, will not be confined to the particular points which they purport to touch, but will throw the whole system of Hindu marriage and family life into great confusion. If a beginning is allowed to be made on the lines proposed in the Questionnaire, many other provisions of similar kind relating to marriage and divorce prevailing in other communities will inevitably follow, *e.g.*, divorce Courts, decree *nisi*, re-marriage of divorced women, incompatibility of temper as a ground for divorce, etc. Historians and contemporary observers agree that the Hindu ideal of marriage and the Hindu system of family life have conduced both to secure a high degree of family welfare and happiness, and the preservation of Hindu society. It is recognised that communities, ancient or modern, which permitted freedom of marriage and divorce to women have not preserved their well-being and vitality in the same measure as Hindu society has. It would therefore be undesirable, to frame new laws based on notions of individual liberty and individual happiness, and apply them to a society governed by principles based on the eternal revealed law and designed to attain high social and spiritual ends. It is not beyond doubt that even communities, which regard marriage purely as a secular affair, enjoy better happiness and benefit by allowing dissolutions of marriage, and re-marriage of women. By the introduction of provisions for dissolution of marriage and re-marriage of women, Hindu society will lose gradually the degree of peace, security and happiness of domestic life which it now enjoys. It will also suffer irreparable injury from the spiritual and other worldly (*Adhyatma and para lowkika*) aspects.

The proposals give the wife the right of claiming separate maintenance in absolute terms. Good grounds may exist to justify the husband objecting to the wife's claim. She may be suffering from disease or infirmity referred to in clauses (1) and (2), or may be insane. Instances of a wife being cruel to the husband are not impossible to conceive. The wife may desert the husband without just cause. The wife's habits or conduct may be such as to threaten ruin to the peace or economy of the husband's household. Or, she may be immoral, or irreligious, or change her religion. The existence of one or other of these should disable the wife from claiming the right of separate maintenance.[2] From Part II of the Questionnaire, it does not appear that the Bill has made provisions to this effect.

1. Manu IX—79.

2. Manu IX—79, 80.

The Bill seeks to help and encourage women to live separately when they feel that their living with the husband is uncomfortable. If the legislation is to be made impartial and complete, it would be necessary to give the husband the right to claim separation from the wife where grounds exist similar to those for which the wife is entitled to claim separation. In former times, the husband alone earned property by exertion, or got it by inheritance. Nowadays, the wife is likely to have as much property, got by earning or inheritance, as the husband. To make the reciprocity complete, it would be necessary to provide for the husband claiming separate maintenance from the wife where circumstances justifying such claim exist. If the impulses and reasoning by which legislation like Dr. Deshmuk's Bill are prompted, are allowed free play and worked out to their logical conclusion, in course of time and under the stress of modern conditions, cases of husband and wife living separately will greatly increase. By law and custom, Hindu women have always lived as inseparable units of Hindu families, exerting a unique moral and spiritual influence over the whole family atmosphere. Legislation of this kind will create and tend to multiply the occasions and temptations for women to tear themselves away from family life, and live separately. Ultimately, the purity and integrity of Hindu family life, and the strength and stability which caste-life has given to Hindu society will disappear. Clause (4) is worded in vague and general terms. It is liable to abuse in practice. Clause (6) of the "grounds" makes an one-sided and drastic provision.

We are of opinion that there is no need for undertaking legislation of the kind proposed by Dr. Deshmuk's Bill.

Question (1): No girl would knowingly have been given in marriage to a person of such unsoundness of mind as to be unable to understand the nature and meaning of marriage. In cases of the husband's insanity, nullifying the marriage would be no remedy, as that will leave the wife adrift. In such a case, the claim for maintenance cannot be against the husband who is insane, but against those who control his property. The better course for the wife would be to continue under the protection of the husband's relations. If those relations refuse to maintain her, the Court should apply the provisions for such cases laid down in the *Smritis* and order those in charge of the husband's property to grant the wife suitable maintenance.

Question (2): There ought to be no departure from the existing law. The cases of a husband marrying a second wife, when the first wife is living, are very rare. Hindu law permits the husband to marry a second wife under certain circumstances —like childlessness of the first wife, etc.[1] But the husband is

1. Manu IX—80; Yajnavalkya I—73.

enjoined to properly care for and maintain the first wife, on threat of dire sin if he does not do so.[1] The proposal to nullify a second marriage by the husband is against the very ideal of Hindu marriage, as the essential purpose of marriage is to get male offspring so as to ensure spiritual benefit to the line of ancestors, and to perpetuate Vedic culture and the practices of Dharma through unbroken continuity of lineage.[2] If the husband marries a second wife without just cause, the Smritis have made special provisions for penalising him and the Courts can enforce them. The nullification or penalisation of the husband's second marriage under any circumstances will not also work in practice so as to produce beneficial results.

The provision that the wife can claim separate maintenance, if the husband turns a recluse, has no point. If, as a recluse, the husband has left home and property he is civilly dead. No legal remedy can lie against him. If the husband changes his religion, according to the Sastras the husband becomes a *Pathitha* and the wife cannot live with him. Therefore, maintenance will have to be provided for her.[3]

Question (3): There is no need for providing grounds for passing decrees of nullity of marriage, or for Courts to administer such law. According to Manu, Yajnavalkya and other Rishis, *divorce* is *not* permissible, and no Hindu wife can free herself from the marriage tie.[4] The present arrangement in which ordinary civil Courts are able to grant relief by way of separate residence or maintenance to a wife in suitable cases is enough.

Question (3) (*a*): The two matters dealt with in the question are not relevant to the purpose or the scope of Dr. Deshmuk's Bill. The present rule of Hindu Law, that inter-caste marriages are invalid, should stand. Manu prohibits it. Yajnavalkya condemns it.[5] Gauthama, Baudhayana, Vishnu, are all against it. Even anuloma marriages are not permitted in this Kali Age (*Kali Varjya*). The proposal to validate inter-caste marriages is not only against the injunctions of the *Rishis*, it will also seriously interfere with the principles of hereditary caste and the division of functions, which are preserved by preventing inter-caste marriages. We are of opinion that the world outside the Hindu community is suffering from its present ills for not adopting the above principles in their social life. So also, *Sagotra* marriages are prohibited by all *Rishis*. Marriages made within the *Gotra* are null and void.[6] *Sagotra* marriages cannot

1. Yajnavalkya I—74.
2. Manu III—79, 80; IX—137.
3. Yajnavalkya I—77.
4. Manu IX—46, 47; Yajnavalkya I—82, 65, 75.
5. Manu III—15, 17; Yajnavalkya I—55, 56.
6. Manu III—5; Yajnavalkya I—53.

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be valid even among Sudras. There are many Sudra families having their special *Gotras,* and marriages within such *Gotras* are null and void.

It is wrong to attempt to change the rules and *acharas* based on the express commands of *Rishis* and sanctified by tens of centuries of unbroken practice. Questions like *Sagotra* marriages and *Asavarna* (inter-caste) marriages can, if at all, be considered only by a body of persons well-versed and having full faith in the Vedas and Smritis.[1] Except for a few social reformers, the great millions of Hindus are all orthodox. They do not desire that inter-caste marriages or *Sagotra* marriages should be permitted.

Questions 2 and 3 (a) are framed in a misleading manner. The question begins "Has the time arrived......." The suggestions made in them are against the culture, and conscience of the Hindu community. They express the viewpoint of the reformer, who is ever wishing for the arrival of fresh times for making fresh changes. For the Hindu community, following the *Sastras* and *Sishtacharas,* the time for making such changes in the law can never arrive.

Question (4): No legislation is necessary to alter the rules of Hindu law governing marriage and family life. No new Courts, therefore, need be established for administering such laws.

Question (5): It is not necessary to bind the discretion of Courts by fixing the maintenance to be granted at a fixed proportion of the husband's income. The amount may be left to the discretion of the Court. It is a serious defect of the Bill that it gives an unqualified right to the wife to claim maintenance, without reference to the pecuniary circumstances of the husband or herself. The husband may be poor, or the wife seeking to claim maintenance may herself be rich, having property got by earnings or inheritance. The wife's right to claim maintenance should be qualified by having regard to the circumstances of the husband as well as of the wife.

Question (6): The suggestion should not be adopted. The remedy may be to punish the husband, not to allow the wife to cut herself away from the home. Provision may also be made for ejecting the adulterous woman from the home where her stay is illegitimate.

Part III:—

Question (1), 1 (*a*) of the questions are covered by the introductory remarks and by the answers given to Part I of the Questionnaire. The old rules of inheritance should have been

1. Yajnavalkya I—9.

allowed to stand. The *Smriti* injunctions alone are the sure and only guide for settling the order of inheritance. There can be no end to this kind of legislation, if changes in Hindu law are to be undertaken on theoretical or sentimental grounds, as such grounds will shift and vary unlimitedly.

JOTTINGS AND CUTTINGS.

Reference in Court to the late Mr. S. Srinivasa Iyengar.

A reference to the death of Mr. S. Srinivasa Iyengar was made on the 20th May, 41, by Sir Alladi Krishnaswami Aiyar, Advocate-General, before the Vacation Court, presided over by the Hon'ble Mr. Justice Somayya.

The Advocate-General said: "It is my sad and unfortunate duty that I have to refer here to the death of our esteemed leader and distinguished lawyer, Mr. S. Srinivasa Iyengar. It may be that I may have to reserve for another occasion or another place the task of giving a full review of his life and career. I feel the loss too personally and the stroke has been too sudden for me to command the necessary strength to give expression to my feelings of deep respect and regard for the departed.

The late Mr. V. Krishnaswami Aiyar who had a great regard for Mr. Srinivasa Iyengar is reported on very good authority to have introduced Mr. Srinivasa Iyengar, at a time when Mr. Srinivasa Iyengar was comparatively young, to Dr. Ghosh, the veteran lawyer, who presided over the deliberations of the Madras Congress, in these almost flattering terms at the time: "This is the son-in-law of Sir V. Bhashyam Iyengar and in some respects greater than Sir V. Bhashyam Iyengar." That briefly sums up Mr. Srinivasa Iyengar's position in the legal profession. At the early age of 42 or so, Mr. Srinivasa Iyengar was appointed Advocate-General and his appointment was received with universal satisfaction. He filled the office with great distinction, ability and credit. A brilliant and acute lawyer of great juristic eminence, a most resourceful advocate whose thoughts ran in advance of his expression, rich, pregnant and terse though the latter was, respected alike by his friends and opponents at the Bar and by the Bench—these briefly sum up his qualities as an Advocate.

Almost from the commencement of his career, I had close and intimate touch with him, first as a Junior with him in some important cases and latterly as opponent in several important cases both in the High Court and in the mofussil courts, the last of such being the Punganur case before Mr. Justice Pandrang Row and Mr. Justice Abdur Rahman. It is no exaggeration to say that there was none

whom I feared and respected more than Mr. Srinivasa Iyengar. His energy was phenomenal, his industry amazing and the fecundity of his ideas was tantalising to his juniors and made them feel sometimes puzzled and distracted.

Upon his contribution to the public life of this Province, his fervent patriotism, his almost religious zeal for the future of his country, while he always stood for the elimination of religion from politics, his early social reform activities, his career as a front-rank politician, his non-communal outlook on the political questions of the day, his contribution to the political thought through writings and speeches in recent times, it is unnecessary to dwell at length at this place. Deep and abiding as his patriotism was, Mr. Srinivasa Iyengar could not see his way to throw in his lot with any particular organisation or section in recent times. It looked as if he was in a self-imposed cage.

One noticed in conversation with him in recent years a sense of unfulfilled purpose, though it cannot be said that his mind was not full of solutions for the complicated political and social problems of the country. On account of failing eye-sight, he could not devote his attention to the profession though there were incessant and persistent calls on the part of the clientele for his services. His death is a great loss to the profession in Madras. As a public man and as a lawyer, Mr. Srinivasa Iyengar held a unique place in India and his loss will be deplored not merely in this province but in the whole of India.

On behalf of the Bar let me convey my condolences to the bereaved members of the family of the deceased."

Mr. Justice Somayya, endorsing the sentiments expressed by the Advocate-General, said: "I associate myself with every word of what you have said in regard to Mr. Srinivasa Iyengar. His was, indeed, a unique career right from the beginning. From 1910, when I became an apprentice, I have known him and from my experience I endorse every word of what you have said. He was a brilliant lawyer and his loss leaves a void which it would be very difficult to fill. Of his public life you have said enough and I need not add to it. I request you, Mr. Advocate-General, to convey my sympathy to the members of the bereaved family."

[END OF VOLUME 1941—I.]

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NOTES OF INDIAN CASES.

JADU NATH RAY *v.* PARAMESWAR MULLICK, (1940) 1 M.L.J. 97 =L.R. 67 I.A. 11=I.L.R. (1940) 1 Cal. 255 (P.C.).

In this decision the Privy Council deals with a point of practice relating to partition actions, namely, whether a mortgagee from a coparcener of his share in joint family property is entitled to come in and if so at what stage of a partition suit by a member of the family. Though there is a suggestion at one place in the judgment that their Lordships intended to elucidate the point with a view to clarify the procedure not merely in Bengal but elsewhere also (p. 260) the Privy Council has not in fact given any lead in the matter.

In England a mortgagee of the whole estate would not be a necessary party in a partition action but a mortgagee of a portion of the joint estate would be, Cf. *Swan* v, *Swan*[1], *Sinclair* v. *James*[2]. In India if a person sets up a title to any fund or property with the joint family pending a partition action "containing" the same, since the determination of that question would conduce to an ascertainment of the assets of the family available for purposes of division without the finding being challenged in any separate action, such a person would be a proper party in the suit for partition brought by any member of the family and O. 1, r. 10, of the Civil Procedure Code would allow of his being impleaded, *Ramaswami Chettiar* v. *Vellayappa Chettiar.*[3] Again in a suit for partition between a father and his sons since it would be desirable to have a predetermination of the binding character of any debts incurred by the father as against the sons, prior to the allotment of properties, it has been held to be inadvisable to dispose of the suit in the absence of the creditors who might re-open the whole question on the morrow of a decision that certain debts and charges were not properly charged upon the family

1. (1819) 8 Price 518=146 E.R. 1281. 2. (1894) 3 Ch. 554.
3. (1930) 60 M.L.J. 229.

estate with the result that the same question will have to be tried twice over with results probably discordant, *Shanmugha Nadan* v. *Arunachalam Chetty*[1], *Baluswami Iyer*, In re[2].

Where there is a mortgage subsequent to a suit for partition, of a coparcener's share it has been held that the mortgagee will be neither a necessary nor a proper party to the partition suit as his presence cannot affect the adjudication of shares and the allotment of properties, see *Annamalai* v. *Koothappudayar*[3]. Where however the mortgage is one created prior to the partition suit and the share of the mortgagor-coparcener is disputed in the suit the mortgagee will be entitled to come in in the partition action as a proper party and O. 1, r. 10, of the Civil Procedure Code would permit the addition, *Prafulla Kumar Mitra* v. *Dhirendra Lal Datta*[4]. Where the share of the mortgagor is not in dispute the Courts in India have adopted different practices in the matter of allowing the mortgagee to be represented in the partition action. A partition no doubt affects the interest of a mortgagee of an undivided share, since, after the partition his security is upon the divided share or the separate allotment. If the mortgage is of a special portion of the family property and possession of such portion can on partition be given to the mortgagor without any injustice to prior incumbrancers or to coparceners it would be the *duty* of the Court making the partition to give effect to the mortgage so as to "marshall" the family properties among the coparceners as to allot that portion or so much of it as may be just to the mortgagee, *Udaram* v. *Ramu Panduji*[5]. When accounts are taken and distribution consequent thereon is made it is but equitable that the share of the coparcener who dealt with the land should *cæteris paribus* be so made up as to embrace wholly or as far as possible the land which has been encumbered as belonging to such coparcener, *Pandurang* v. *Bhaskar*[6]. For these reasons, as recognised in the instant decision (p. 260), some High Courts would appear to join the mortgagee as party to the suit as a matter of course. In *Sadu Bin Raghu* v. *Ram Bin Govind*[7], it was held that it is both good sense and established law that all parties interested in the properties to be divided must be brought before the Court in one proceeding and that the mortgagee of a coparcener's share is a proper and even a *necessary* party to the partition suit. The principle has been applied that under O. 1, r. 10 of the Civil Procedure Code a person not originally a party

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1. (1921) 45 Mad. 194.
2. (1928) 51 Mad. 417, 439.
3. A.I.R. 1934 Mad. 485.
4. I.L.R. (1940) 2 Cal. 37.
5. (1875) 11 Bom. H.C.R. 76.
6. (1874) 11 Bom.H.C. 72.
7. (1892) 16 Bom. 608.

may be impleaded if his presence is necessary to completely and effectually determine the dispute so that it shall not again be raised in that or any other suit between the parties to the suit or between any of them and third parties, *Vydinadayya* v. *Sitaramayyan*[1]; Cf., *Montgomery* v. *Foy, Morgan and Co.*[2]. The practice in Bengal is different. In case of a decree for partition being made it is considered sufficient that the mortgagee should be given leave to come in and attend the partition proceedings as a *quasi party* after the passing of the preliminary decree and the appointment of a commissioner and that any application by such a person to come in at any earlier stage of the suit should be refused in the absence of *special* facts, *Mohindra Bhoosan Biswas* v. *Shoshee Bhoosan Biswas*[3], *Khetterpal Sritirutno* v. *Khelal Kristo Bhattacharjee*[4], *Jadunath Roy* v. *Murari Mohan*[5]. In the instant decision the Privy Council approves this practice. Sir George Rankin states that "it will in general meet the case if he is allowed to attend and be heard at that stage at which the making of a proper allotment is effected" (p. 261). Whether the statement amounts to a disapproval of the practice adopted by the other High Courts permitting a mortgagee of a coparcener's share to be added as a proper party under O. 1, r. 10 of the Civil Procedure Code even during the earlier stages of a partition action and in the absence of any *special* facts whatsoever, is a matter which is still left at large.

EMPEROR *v.* RAUTMAL KANIRAM, I.L.R. (1940) BOM. 38.

This decision holds that every Judge or Magistrate trying a criminal case has inherent power to direct the arrest of the accused in the case if the latter is trying to tamper with the prosecution witnesses or otherwise defeat the ends of justice, notwithstanding that an order for his release on bail had been passed by another Court or Magistrate who had seisin of the case at an earlier stage. The decision is more or less one of first impression and seems to run counter to S. 497 (5) of the Criminal Procedure Code, which states that a High Court or Court of Session, and in the case of a person released *by itself* any other Court may cause any person who has been released under that section to be arrested and committed to custody. The language of the section is clear that in the matter of re-arresting a person released on bail, the only Court apart from the High Court or the Court of Session that can act is the *very Court* that granted the bail. It follows as a necessary implication that no other Court can exercise such power. The mere fact that a Court has been directed

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1. (1881) 5 Mad. 52.
2. (1895) 2 Q.B. 321 (C.A.).
3. (1880) 5 Cal. 882.
4. (1894) 21 Cal. 904.
5. (1931) 35 C.W.N. 296.

to try the particular case cannot give it jurisdiction to order the re-arrest of an accused released on bail by another Court which had the seisin of the case at an earlier stage. The words "by itself" in S. 497 (5) mean the Magistrate who commits the man to custody and cannot include any other Magistrate of the same class, *Lakshmi* v. *Emperor*.[1] No Magistrate other than the one who has granted bail can cancel the same and order re-arrest, see *Imperatrix* v. *Sadashiv*[2] and *Maung Ba Chit* v. *Emperor*[3]. There is nothing to prevent an application being made to the Court of Session or the High Court where it is necessary and imperative that the accused should be re-arrested. To state as has been done in the instant decision that these Courts may not be available in an emergency to make an immediate order and therefore the Magistrate having seisin of the case should be deemed endowed with the necessary power is not an argument carrying conviction. Nor is it beyond doubt whether the Magistrate having seisin of the case can exercise any inherent power at all in the matter. S. 561-A of the Criminal Procedure Code deals with the inherent power of the High Court only. Assuming however that other Courts have also inherent powers, it is clear that such powers cannot be invoked in a matter regarding which there is a specific statutory provision, *see* *Assistant Govt. Advocate* v. *Upendra Nath Mukerji*.[4]

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1. (1933) 147 I.C. 1159. 2. (1896) I.L.R. 22 Bom. 549.
3. (1910) 10 I.C. 774. 4. A.I.R. 1931 Pat. 81.

EMPEROR *v.* RAMJI VALA, I.L.R. (1940) Bom. 500.

In this case it was held that on a notice under S. 439 (2) of the Criminal Procedure Code to enhance sentence passed on an accused convicted on a trial with a jury, the accused cannot challenge in showing cause against conviction under S. 439 (6) the verdict of the jury on facts. S. 439 (1) provides for the exercise by the High Court in revision of the same powers as it has on appeal. S. 423 (2) provides that the Court of Appeal cannot alter or reverse a verdict of the jury except on the ground of misdirection by the trial Judge or misunderstanding by the jury of the law as laid down by him. The clauses read together no doubt suggest that in revision the verdict of the jury on facts can be sought to be upset only on these grounds and on no other. S. 439 (6) however states that *notwithstanding anything contained in that section* any convicted person to whom an opportunity has been given of showing cause why his sentence should not be enhanced, shall in showing cause be entitled also *to show cause against his conviction.* The opening words of the sub-section are unambiguous. *Prima facie* they postulate that the scope of sub-S. (6) is not to be controlled by anything contained in sub-Ss. (1) to (5). To argue therefore that sub-S.(6) should be read merely as a provision designed to get over the bar arising under sub-S. (5), that where an appeal lies and no appeal is brought, a proceeding in revision at the instance of the party having the right of appeal shall not lie,—see *Emperor* v. *Jorabhai*[1] and *The King* v. *Nga Ba Saing*[2]—does not seem to be justified and is tantamount to substituting for the opening words of sub-S. (6) "notwithstanding anything contained in this section" the words "notwithstanding anything contained in sub-S. (5)." It follows therefore that S. 439 (6) is paramount to S. 439 (1) and hence to S. 423 (2). In other words where an accused is asked to show cause against enhancement on notice issued under S. 439 (2), even if the trial had been with a jury, he would be competent to show cause against conviction not merely on the narrow grounds open to him under S. 423 (2), had he himself preferred an appeal or revision, but on wider grounds as well by attempting to get reviewed the entire evidence. In England no appeal can lie by the Crown against adequacy of sentence imposed by the Judge at the trial. The question of enhancement can be mooted before the Court of Criminal Appeal only where an appeal had been preferred by the convicted person himself. In India no doubt the practice is different but there is nothing to indicate that the policy of the law is to encourage applications by the Crown to enhance the sentences awarded by the trial Court. The provision for reopening at the instance of the Crown the question of adequacy of sentence even like the provision empower-

1. (1926) I.L.R. 50 Bom. 783   2. A.I.R. 1939 Rang. 392.

ing the Crown to appeal against acquittals is only to make the law theoretically complete. The policy of the law being against applications for enhancement of sentences normally where such applications are in fact preferred, evidently the Legislature has intended that the accused should have the fullest freedom to show cause against the conviction without being tied down to particular grounds only. Whether such latitude should be available where the High Court has already dismissed an appeal or revision preferred by the accused is another matter and probably the principle of finality of judgments of the highest appellate authority would operate as a bar. Likewise what action the High Court should take where the accused has not acted in the matter and the Court has on an application to enhance sentence come to the conclusion that the evidence does not justify the conviction is also a different matter. The instant decision deals with a much narrower question, whether in showing cause against conviction under S. 439 (6) there being no other complications, the accused can invite the High Court to review the verdict of the jury on facts. In Calcutta the question has been consistently answered in the negative, *Khodabux Haji* v. *Emperor*[1] *and Alef Shaikh* v. *Emperor*[2]; see also *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Jnanendra Nath Ghosh*[3]. In Bombay the broader interpretation of S. 439 (6) has been favoured in *Emperor* v. *Ramchandra*[4], a view which is repudiated by the instant decision. In Allahabad though the decision in *Emperor* v. *Bishwanath*[5] holds that S. 439 (6) will have to be read with S. 423 (2) an earlier ruling of that Court had taken a different view, *Emperor* v. *Bansgopal*[6]. In Sind and Madras the construction adopted by the Calcutta High Court has been accepted, *Emperor* v. *Haji Kahmoo*[7] *and Ratnasabapathy Goundan* v. *Public Prosecutor*[8]. In view of the fact that judicial opinion has not been uniform and that the construction favoured in Calcutta and Madras does not give to the opening words of S. 439 (6) its full value, a more authoritative elucidation or a legislative clarification of the matter is certainly to be desired.

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1. (1933) I.L.R. 61 Cal. 6.
2. (1935) I.L.R. 62 Cal. 952.
3. (1929) I.L.R. 56 Cal. 1145.
4. (1932) 35 Bom. L.R. 174.
5. A.I.R. 1936 All. 850.
6. Cr. Rev. No. 523 of 1930 (Allahabad High Court).
7. A.I.R. 1926 Sind 233.
8. (1936) 71 M. L. J. 231: I.L.R. 59 Mad. 904.

NAGAPPA CHETTIAR *v.* ANNAPOORANI ACHI, (1941) 1 M.L.J. 164 (F.B.) :

This decision holds that r. 8 framed under S. 28 of the Madras Agriculturists' Relief Act providing for appeals from orders under S. 19 amending or refusing to amend a decree or entering or refusing to enter satisfaction in respect of a decree as if the orders related to the execution, discharge or satisfaction of the decree within the meaning of S. 47, Civil Procedure Code is *ultra vires* the rule-making powers of the Provincial Government under the Act. The conclusion is reached mainly as flowing out of the principle that " an appeal does not exist in the nature of things ; a right of appeal from any decision of any tribunal must be given by express enactment," *Sandback Charity Trustees* v. *The North Staffordshire Railway Co.*,[1] *Attorney-General* v. *Sillem*[2], *Colonial Sugar Refining Co.* v. *Irving*[3]. *etc.* The argument is that the Madras Act IV of 1938 not having provided for an appeal such a substantive right can't be conferred by rules framed under the Act. It is submitted that this is a wrong approach to the question. It is well settled that where by statute matters are referred to the determination of a Court with no further provision the necessary implication is that the Court will determine the matters as a Court and that its jurisdiction is enlarged but that all the incidents of such jurisdiction including the right of appeal from its decision remain the same, *National Telephone Co. Ltd.* v. *Post Master-General*[4]. S. 19 of Madras Act IV of 1938 merely adds to the powers which the Court that passed the decree has already as a court of law. Hence no question of giving a right of appeal by implication or otherwise can arise at all. It is simply extending the jurisdiction of an existing court of law with all its incidents including a right of appeal, see *ibid.* pp. 552, 555 and 557. The observations of Lord Macnaghten in *Rangoon Botatoung Co., Ltd.* v. *The Collector of Rangoon*[5],—a case under Ss. 26 and 54 of the Land Acquisition Act before their amendment—in negativing a right of appeal to the Privy Council against an award which had been confirmed by the High Court on appeal are in no way inconsistent with the decision in the *National Telephone Company's case*. No appeal ordinarily lies from an award. S. 54 of the Land Acquisition Act prior to its amendment in 1921 however provided for one appeal. The right being an exception to the ordinary rule in the case of awards was evidently held as incapable of being extended so as to permit of a further appeal to the Privy Council. In *Secretary of State* v. *Chellikani Rama Rao*[6], Lord Shaw distinguished the *Rangoon Botatoung*

1. (1877) L.R. 3 Q.B.D. 1.
2. (1864) 10 H.L.C. 704
3. (1905) A.C. 369.
4. (1913) A.C. 546.
5. (1912) I.L.R. 40 Cal. 21 (P.C.)
6. (1916) I.L.R. 39 Mad. 617.

case on this very ground. His Lordship pointed out how the latter was a case where from beginning to end the proceedings were ostensibly and actually arbitration proceedings and as such there was no right to carry an award as to the value of the land further than to the courts specifically set up by the statute for the determination of that value. In *Minakshi Naidu* v. *Subramania Sastri*[1], the Privy Council held that an appeal will not lie from an order of the District Judge acting under S. 10 of the Religious Endowments Act of 1863 appointing a member to fill a vacancy in a committee. There again the policy of the Act was generally to prevent litigation in civil Courts relating to Endowments, see S. 18. The right of suit itself having been made conditional the view of the Privy Council that a right of appeal can't exist except by specific conferment can be understood. The decision of the Privy Council in *Secretary of State* v. *Chellikani Rama Rao*[2] elucidates the true position. That was a case under the Madras Forest Act, 1882. S. 10 of the Act had provided for an appeal from the order of the Forest Settlement Officer on applications in respect of certain claims to forest land under the Act to the District Judge and such appeal was to be filed within 30 days of the rejection of the claim. The question arose whether an appeal from the decision of the District Judge to the High Court would be incompetent, as being excluded by the terms of the statute. In holding that an appeal will lie to the High Court, Lord Shaw observed : "When proceedings of this character reach the District Court that court is appealed to as one of the ordinary courts of the country, with regard to whose procedure, orders and decrees the ordinary rules of the Civil Procedure Code will apply." Lord Shaw further pointed out that where a new dispute is created and the ordinary courts of the country are seized of it, then it would in the opinion of the Board require "*a specific limitation to exclude the ordinary incidents of litigation*," see also *Kamaraju* v. *Secretary of State*[3]. The same view is indicated by the Judicial Committee in *Ravi Veeraraghavalu* v. *Venkata Narasimhalu Naidu*[4], where it was held that though S. 69 of the Madras Rent Recovery Act, 1865, only provided for a regular appeal and no further appeal was provided from a decision of the District Judge on appeal from the Collector given by the terms of the Act itself, still an appeal would lie to the High Court from the order of the District Judge unless that right was taken away by express legislation or by some express provision of law. The Privy Council further held that apart from the law *in view of the actual practice since the passing of the Act to enter-*

1. (1887) I.L.R. 11 Mad. 26 (P.C.).
2. (1916) I.L.R. 39 Mad. 617 (P.C.).
3. (1886) I.L.R. 11 Mad. 309 (F.B.).
4. (1914) I.L.R. 37 Mad. 443 (P.C.).

tain such appeals their Lordships would not be disposed to interfere with such a practice " even if they thought there was an implied rule against second appeals lying from the decisions of the District Judge with respect to adjudications under the Act to the Collector." The Madras Act IV of 1938 does not constitute a new forum or a new tribunal, nor does it enact any special procedure. It merely recognises a new *lis* which is to be decided by the existing ordinary Civil Courts. The fact that under s. 19 the Court is to act on an *application* can make no real difference. That being so the right of appeal which is an ordinary incident of the procedure of such courts will not be lost unless there is a specific curtailment. To apply therefore the rule that a right of appeal can't exist unless granted by express statutory authority does not seem to be warranted.

Under the Government of India Act, 1935, the Provincial Legislative authority is plenary in character subject only to the limits prescribed by that statute. Where such a legislature having plenary authority empowers by a legislative enactment the Provincial Government to make a rule, the scope of the Government's authority to make the rule is coterminous with the legislative power which confers the authority, subject to the qualification that nothing in the rules framed by the Government in exercise of its power shall in any way be inconsistent with or repugnant to the substantive provisions and dominant scheme of the legislation, see S. 28 (3) of Madras Act IV of 1938. This is reinforced by S. 49 (2) of the Government of India Act, 1935, which provides that subject to the provisions of that statute the executive authority of each province extends to the matters with respect to which the legislature of the province has power to make laws. It therefore follows that to the extent to which the executive authority can legislate, its power is plenary and all the more so where a plenary legislative body has conferred on the Government the power to make rules for the proper working of the Act.

The legislative function of the Provincial Government extends to the jurisdiction and powers of all courts with respect to any of the matters in List II and an enactment which has been held to fall under clauses 20 and 27 in the exclusively Provincial List has *prima facie* the power to deal with the jurisdiction and powers of all courts in regard to such matters. The words " of all courts " include any appellate court including the High Court. This is apparent from the clause which exempts the Federal Court from the ambit of Provincial Legislative authority, vide List II, cl. 2.

Also the matters relating to Civil Procedure being included in the concurrent Legislative List III, part I sub-clause 4 and the

necessary sanction having been given under s. 107 (2) it is clear that both the Provincial Legislature as well as the Provincial Government have the right to declare from time to time the form and the nature of the proceedings under the Madras Act IV of 1938 and also to provide for appeals from orders on proceedings under the Act. If that were so, it does not seem reasonable to hold that a Government empowered by a sovereign legislature should not be entitled to declare that a particular proceeding authorised by it shall be decided by courts as under a provision of the Civil Procedure Code which provides for a right of appeal.

EMPEROR *v.* FULBHAI JOSHI, I.L.R. 1940 Bom. 709.

This case decides an interesting question arising under the Child Marriage Restraint Act, namely, whether in a case where a bride, who not being a child herself, contracts a child marriage within the meaning of the Act, her parents would by virtue of their participation in the *kanyadan* ceremony lay themselves open to a prosecution under S. 5 of the Act as, having "performed, conducted or directed" a child marriage. Answering the question in the negative the learned Judges record their dissent from the ruling of the Allahabad High Court in *Munshi Ram* v. *Emperor*[1].

The Act contemplates three classes of persons as liable to be punished in respect of a child marriage. Ss. 3 and 4 deal with the punishment to be awarded to a male contracting a child marriage, he himself not being a child. S. 6 prescribes the punishment awardable to parents or guardians of a minor contracting a child marriage if they have done anything to promote such a marriage or have permitted such a marriage or have failed to prevent it from being solemnised. S. 5 declares liable to punishment *any one* who "performs, conducts or directs a child marriage." The section is general in terms and does not specify the particular class of persons intended to be covered by it. Two pieces of policy are however clear and will affect the construction of the section and a determination of its scope, namely, (1) a female contracting a child marriage shall not be punished; and (2) a female parent or guardian of a minor contracting a child marriage shall not be sentenced to imprisonment for an offence under S. 6. The last would suggest that parents could be held liable in respect of a child marriage, if at all, under S.6 only and not under S. 5 which does not have a proviso exempting a woman from imprisonment for an offence under that section, which however would surely have been pro-

1. A.I.R. 1936 All. 11.

vided had it been the intention of the legislature to render the parents liable to be charged under that section also. It may stand to reason that parents may be called to account if a minor under their charge contracts a child marriage and that is done by S. 5. Where however a person who is not a minor contracts a child marriage there cannot be any reason in holding them liable in respect of such a marriage as they may have no control at all over such a person in law. If S. 5 is construed as applicable to parents also then it will be to hold them liable to punishment in such cases as well. That S. 5 can apply only to strangers is also apparent for another reason, namely, that otherwise the concluding words of that section throwing upon the accused the burden of proving that he or she had reason to believe that the marriage was not a child marriage would be unmeaning, inasmuch as parents will surely know the age of their own children best of all persons, see *Public Prosecutor* v. *Rattayya*[1]. The section can thus apply to strangers only and not to parents, *Ganpat Rao Devaji* v. *Emperor*[2].

A clue to the scope of S. 5 is afforded by the marginal note which speaks of punishment for "solemnising" a child marriage. Though it is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act and that there is no reason for giving the marginal notes in an Indian statute any greater authority than the marginal notes in an English Act of Parliament (see *Thakurain Balraj Kunwar* v. *Rae Jagatpal Singh*[3], *Kesava Chetty* v. *The Secretary of State*[4], *Attorney-General* v. *Great Eastern Railway Co.*[5]) still the rule is by no means rigid and where there is a genuine difficulty in understanding a provision it has been held that "the side-note.... although it forms no part of the section is of some assistance inasmuch as it shows the drift of the section," *Bushell* v. *Hammond*[6], *Dharwar Urban Bank Ltd.* v. *Krishna Rao*[7]. Participating in *kanyadan* will certainly not amount to "solemnising" a marriage. The expression "performs, conducts or directs" a child marriage in S. 5 can advert only to the link—be it a religious ceremony or a formality sanctioned by the custom of the community—by which the matrimonial relationship is finally and beyond recall established. Acts of a preliminary nature or preparatory in character would thus stand excluded and in a Hindu marriage there won't

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1. I.L.R. 1937 Mad. 854.
2. (1932) 142 I.C. 277.
3. (1904) 26 All. 393 : 31 I.A. 132, 142-143.
4. (1918) 36 M.L.J. 222: I.L.R 42 Mad. 451, 453.
5. (1879) 11 Ch. 449.
6. (1904) 73 L.J.K.B. 1006.
7. I.L.R 1937 Bom. 293, 302-303.

be performance of the marriage by anything done till *saptapadhi*. Thus merely attending a marriage ceremony or applying for permission to hold a *nach* with music and fireworks *etc.*, will not amount to performing *etc.*, a child marriage.[1]

For the reasons indicated *supra* it will be difficult to accept the construction of S. 5 as including within its purview parents also and the ruling in the instant decision seems to be more in consonance with reason than the ruling in *Munshi Ram* v. *Emperor*[2].

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1. *Bachchu Lal* v. *Emperor*, (1936) 162 I.C. 389.
2. A.I.R. 1936 All. 11.

KONDAYYA RAO *v.* NAGANNA, (1941) 1 M.L.J. 336 (F.B.).

In this case a Full Bench of the Madras High Court has by a majority opinion held that on an absolute transfer of the *kudivaram* right in private lands lying within the ambit of an estate by a landholder—the *melvaram* right alone being retained by him—there is a conversion of the land into *ryoti* land and any covenants in the contract of transfer inconsistent with the incidents annexed to ryoti tenure by the Estates Land Act will be void to the extent of such repugnancy. The matter is almost one of first impression. A permanent right of occupancy is available to a person under the Estates Land Act only by virtue of possession of *ryoti* land in an estate at the commencement of the Act or by subsequent admission by a landholder to the possession of such land, S. (6). Accrual of permanent rights of occupancy thus stands conditioned upon the land being *ryoti*. This conclusion is supported by S. 181, which prior to its amendment in 1934 recited that nothing contained in S. 6, *etc.*, shall confer a right of permanent occupancy in a landholder's private land. Thus a permanent right of occupancy in regard to private lands in an estate can arise only if such lands shed their character as private lands, by the landholder converting them in the first instance into *ryoti* lands. Without such conversion permanent occupancy rights cannot be had in such lands. The position is made clear by the present S. 181 which states that a landholder shall be at liberty to *convert* his private land into *ryoti* land and *confer occupancy right in land so converted.* Ss. 6 and 181 read together suggest: (1) In an estate occupancy rights can exist only in ryoti lands, (2) even if land is ryoti still occupancy rights may not exist therein—*see* Ss. 6 and 8, and (3) where private lands are converted into ryoti lands occupancy rights therein can exist only by conferment *i.e.*, by admission of a person to the possession of such land with the necessary *animus.*

So in the case of lands which were at their inception private lands for permanent rights of occupancy to arise therein, there must be, firstly, a conversion of such land into ryoti land, and secondly, an admission by the landholder of a person to the possession thereof with intent to confer such rights. The Estates Land Act has not prescribed any method by which conversion could be brought about. Necessarily it will be a question of the intention of the landholder in each case as evidenced by the treatment he has accorded to the land whose character is in issue. The test of private land is whether the landholder cultivates it directly or intends to resume it for such cultivation even though from time to time he demises it for a season, *Bundley* v. *Bukhtoo*[1]; *Artharama Babu* v. *Artha Padhi.*[2] Where the evi-

1. 3 N.W.P. 283.
2. (1912) 25 M.L.J. 248.

dence showed that a landholder did not take the suit lands under his cultivation for more than twenty years, that ryoti pattas were issued regarding such lands and that they were included in the same patta which related to lands which were admittedly ryoti it was held that there was a conversion of the suit lands into ryoti lands, *Saravanaperumal* v. *Subbaiyyan Pillai*.[1] Where the right to take under direct cultivation is abandoned the land ceases to be private. The scheme of the Estates Land Act is, broadly speaking, to divide all cultivable lands in an estate into private lands and ryoti lands—*see* S. 3 (16)—and there is no presumption that any land is private, S. 185. If therefore any cultivable land has ceased to be private by reason of the right to take it under direct cultivation having been parted with, the land automatically becomes ryoti, for there is no *tertium quid*. Right of permanent occupancy is no doubt the main but by no means the sole characteristic of ryoti tenure. But where a landholder parts with the *kudivaram* right absolutely reserving to himself the *melvaram* interest alone he thereby gives up for ever his right to have the land under his direct cultivation; consequently the land ceases to be private land, *Saravanaperumal* v. *Subbaiyyan Pillai*.[1] *Kudivaram* right is synonymous with a right of occupancy, see *Venkata Sastrulu* v. *Seetharamudu*,[2] *Naina Pillai Marakayar* v. *Ramanathan Chettiyar*;[3] hence where *kudivaram* right in private lands within an estate is transferred absolutely a right of permament occupancy is thereby conferred on the transferee and that coupled with the retention of the *melvaram* right alone by the landholder operates constructively as an expression by him of an intention to give up his right to take such lands under direct cultivation at any time. The minority view in the instant decision does not sufficiently allow for the force of these factors. The Statement of Objects and Reasons to the Estates Land Bill mentions that the term *ryot* has been used as the appropriate designation for a cultivator possessing occupancy right. The intention of the Legislature thus seems to be that where occupancy rights are conferred regarding any land in an estate on a person such person should become a ryot and that the land in his possession is ryoti—*see* S. 3 (15).

RAMASUBBARAYA SASTRI *v.* VENKATA APPALANARASIMHARAJU, (1940) 2 M.L.J. 1021.

One of the points decided in this case was that an alienation by a coparcener of his share in the whole of the joint family property or in any part thereof would not sever his status from the

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1. (1922) 16 L.W. 802.
2. (1920) 37 M.L.J. 42=I.L.R. 43 Mad. 166 (P.C.).
3. (1923) 46 M.L.J. 337=I.L.R. 47 Mad. 337 (P.C.).

family and make him a divided member. This view may no doubt be in accord with the preponderance of judicial opinion in the Madras High Court—see *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*,[1] *Subba Rao* v. *Anantanarayana Aiyar*,[2] *Manjayya* v. *Shanmugha*,[3] *Maharaja of Bobbili* v. *Venkataramanjulu*,[4] *Kandasami Udayan* v. *Velayutha Udayan*,[5] *Jagannatha Rao* v. *Ramanna*;[6] see also *Gurlingappa v. Nandapa*[7]—but it is submitted that a conclusion the other way would be in greater consonance with modern trends in joint family law, at least in cases where a coparcener has alienated his entire interest in joint family properties. The capacity of a coparcener to alienate family property for his own purposes is not a topic dealt with by Hindu law texts. The Mitakshara merely declares that an unseparated sapinda has no power over the whole to make a gift, sale or mortgage. It is questionable whether alienation of his share by an individual coparcener was ever recognised by the Hindu jurists, see *Gurlingapa* v. *Nandapa*.[7] As pointed out in *Suraj Bansi* v. *Sheo Pershad*,[8] "there can be little doubt that all such alienations whether voluntary or compulsory are inconsistent with the strict theory of a joint and undivided Hindu family", for according to the true notion of such a family no individual member can predicate of the joint property that he that particular member has a definite share, *Appovier* v. *Ramasubbier*.[9] As such alienations are inconsistent with the theory of Hindu law much help is not likely to be derived from a consideration of the Hindu law texts in the determination of that question, *Chinnu Pillai* v. *Kalimuthu Chetti*.[10] It is as a result of judicial decisions that a coparcener in Madras and Bombay possesses the power to alienate for value his interest in the joint family properties, see *Suraj Bansi* v. *Sheo Pershad*.[8] The decisions have held that when a coparcener so alienates, what the alienee becomes entitled to is what the alienor would get if a partition had been made immediately before the sale, *Aiyyagari Venkataramayya v. Aiyyagari Ramayya*;[1] it is as if the sale is to operate as a partition at the time, *Hardi Narain Sahu v. Ruder Perkash Misser*,[11] Also attachment of a coparcener's share in execution of a decree obtained, against him arrests the operation of survivorship in regard to such share, (*Suraj*

1. (1902) I.L.R. 25 Mad. 690, 717 (F.B.).
2. (1912) 23 M.L.J. 64
3. (1914) 26 M.L.J. 576=I.L.R. 38 Mad. 684.
4. (1914) 27 M.L.J. 409=I.L.R. 39 Mad. 265.
5. (1926) 51 M.L.J. 99, 104.
6. (1937) 2 M.L.J. 386.
7. (1896) I.L.R. 21 B. 797, 802.
8. (1878) I.L.R. 5 Cal. 148 (P.C.).
9. (1866) 11 Moo.I.A. 89 (P.C.).
10. (1910) 21 M.L.J. 246=I.L.R. 35 Mad. 47, 56 (F.B.).
11. (1883) I.L.R. 10 Cal. 626, 636 (P.C.).

Bansi's case)[1] and causes a severance, see *Madho Parshad* v. *Mehrban*.[2] If attachment by Court removes a coparcener's share beyond the range of survivorship and if the interest of the vendee under an alienation, whether voluntary or *in invitum*, is to be worked out as if there was a partition immediately before the alienation and the share of the vendee is not liable to be affected by subsequent happenings in the joint family of which the alienor was a member does not the inference become inevitable that on alienation of his share by a coparcener there is a severance of the alienor from the family?

Again it is now well settled that an unilateral declaration by a coparcener evidencing an unequivocal intention on his part to separate himself from the other members of the family operates to bring about a severance in status, *Suraj* v. *Iqbal*,[3] *Girjia Bai* v. *Sadashiv*,[4] *Bal Krishna* v. *Ram Krishna*,[5] *Ram Narain Sahu* v. *Mt. Makhana*,[6] *etc.* Manifestation of such intention may be express or implied and the intention may be actual or constructive. Does not an alienation by a coparcener of his share constitute an assertion of his individual right as against the rights of the family and cut at the very root of the joint status? If the conduct of one coparcener in *expelling* another would operate as a severance of the joint status as held in *Joy Narain* v. *Girish Chunder*,[7] will not the taking away of his share from the family by a coparcener by passing it on to an alienee be tantamount to an intention on the part of that member to sever himself from the family? Where a coparcener becomes a convert to an alien faith it is held that there is severance in status by reason of his having done an act inconsistent with the status of a joint Hindu family. Likewise if a coparcener contracts a marriage under the Special Marriage Act 1872 as amended in 1923 he is deemed to be severed from the joint family. In both these cases the law attributes to the coparcener in effect an intention to separate himself from the family. It is also held that when the estate of a coparcener has vested in the Official Assignee on his insolvency that estate would continue after his death and would not be defeated by survivorship, *Fakirchand* v. *Motichand*,[8] *Gori Shanker* v. *Official Receiver*.[9] If a coparcener relinquishes his interest in joint family property in favour of another coparcener the benefit of the relinquishment is held to accrue only to that one in whose favour it is made and the other

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1. (1878) I.L.R. 5 Cal. 148 (P.C.).
2. (1891) I.L.R. 18 Cal. 157 (P.C.).
3. (1913) 24 M.L.J. 345=I.L.R. 35 All. 80=40 I.A. 40 (P.C.).
4. (1916) 31 M.L.J. 455=I.L.R. 43 Cal. 1031 (P.C.).
5. (1931) 61 M.L.J. 362=I.L.R. 53 All. 300=58 I.A. 220 (P.C.).
6. I.L.R. 1939 All. 680=(1939) 2 M.L.J. 569 (P.C.).
7. (1878) I.L.R. 4 Cal. 434 (P.C.).
8. (1883) I.L.R. 7 Bom. 438.
9. (1932) I.L.R. 13 Lah. 464.

members of the family will have no rights against such interest, *Peddayya* v. *Ramalingam*.[1] This is on the footing of an alienation by the relinquishing coparcener which places him in the position of a separated member, see *Balkrishna* v. *Savitribai*.[2] If an alienation in favour of a member of the family has that effect there is no reason why when the alienation is in favour of an outsider the same result should not ensue and the alienor placed in the position of a separated member. The arguments against construing an alienation by a coparcener of his share as causing a severance in status are: (1) alienation *per se* is not tantamount to the expression of an intention to separate, *Jagannatha Rao* v. *Ramanna*;[3] (2) the vendee gets under his purchase only an *equity* and nothing more, *Gurlingappa* v. *Nandapa*;[4] and (3) severance of joint family status can be effected only by a mode known to and recognised by Hindu law, *Lakshmanan Chettiar* v. *Srinivasa Iyengar*.[5] If it is permissible to a coparcener to deal with 'his share' it is rather strange to suggest that this predication of individual right is compatible with an intention to remain as a member of the joint family having common rights. The second argument overlooks that the reference to the vendee's right as an *equity* is not to be understood literally as negativing his legal right to his vendor's share, for it is well settled that the death of the alienor or the happening of any other event in the family of which he was a member could not in any degree affect or upset the vendee's title. Nor has the third argument much force. Severance of joint status is now permitted or happens in modes other than those recognised by Hindu law. There are on the other hand strong reasons why an alienation by a coparcener of his entire interest in the family properties should be held to operate as a severance in status. Such a view will ensure reciprocity of rights and avoid unfairness to the other members of the family. It will also make the law logical. The very fact of alienation by a coparcener puts an end to the fluctuating character of the property alienated and thereby effects a severance, *Chinnu Pillai* v. *Kalimuthu Chetti*,[6] see also *Soundararajan* v. *Arunachalam*,[7] *Lakshmi Achi* v. *Narayanaswami Naicker*.[8] This conclusion is also in consonance with the observations of the Privy Council made as early as 1869 in *Ram Chunder Dutt* v. *Chunder Coomar Mundul*[9] where it was said: "It is true that the status of the family as a joint Hindu family was not continuing.

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1. (1885) I.L.R. 11 Mad. 406.
2. (1878) I.L.R. 3 Bom. 54.
3. (1937) 2 M.L.J. 386.
4. (1896) I.L.R. 21 Bom. 79.
5. A.I.R. 1937 Mad. 131.
6. (1910) I.L.R. 35 Mad. 47, 59 (F.B.).
7. (1915) I.L.R. 39 Mad. 159, 172 (F.B.).
8. (1929) I.L.R. 53 Mad. 188.
9. (1869) 13 Moo.I.A. 181, 198 (P.C.).

The alienation of the shares of two members of that family determined that status and substituted the status of co-sharers or joint owners whose rights as is shown by Lord Westbury in the case of *Appovier* v. *Ramasubbier*[1] are in many important respects distinguishable from those of a joint and undivided family". For these reasons it is highly desirable that the law relating to this matter should be settled finally and authoritatively.

Where a coparcener alienates either specific items or his share in such items, then, it may consistently with the doctrine that a person can remain undivided with reference to some items and separated as regards other items with the remaining members of the family, be argued that his status as regards the other items of joint family property remains unaffected; in other words, that the alienor ceases to be a coparcener only *quoad* the property alienated and the coparcenary is thereby reduced only *pro tanto*.[2]

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1. (1866) 11 Moo.I.A. 89 (P.C.).
2. *Krishnaswami Ayyangar* v. *Rajagopala Ayyangar*, (1898) I.L.R. 18 Mad. 73=41 M.L.J. 212; *Srinivasa Sundara Thathachariar* v. *Krishnaswami Iyengar*, (1912) 15 I.C. 854; *Lakshmi Achi v. Narayanasami Naicker*, (1929) I.L.R. 53 Mad. 188=57 M.L.J. 746.

ABDUL ROUF *v.* ABDUR RAHIM, I.L.R. (1940) 2 Cal. 520.

One of the points considered in this case was whether a portion of an entire decree for which execution was not once claimed can form part of a subsequent claim in execution. The English practice is that as a rule a judgment-creditor cannot issue a series of small executions upon his judgment making in the whole the amount of the judgment-debt; upon one judgment he can issue only one execution, *Forster* v. *Baker*,[1] *Rothschild* v. *Fisher*.[2] If however the judgment or order is for the recovery of payment of money and at the same time for the recovery of property other than money the appropriate writs for the enforcement of the two parts of the judgment or order may issue simultaneously or successively.[3] In India there is no statutory provision relating to this matter and the judicial decisions disclose no uniformity of view in the application of the principles of English practice either. There is no provision in the Civil Procedure Code under which a decree-holder can divide the decree into several parts and execute them piecemeal in different Courts or in the same Court. See *Panaji Girdharlal* v. *Ratanchand Hajarimal*,[4] *Kusum Kamini Deby* v. *Sailes Chandra Chakrabarty*.[5] Nor is there anything in the Code prohibiting piecemeal execution. See *Radha Kishen Lall* v. *Radha Pershad Singh*,[6] *Balasubramania Chetti* v. *Swarnammal*,[7] and *Panaji Girdharlal* v. *Ratanchand Hajarimal*.[4] The provisions of O. 2, r. 2 preventing multiplicity of suits are not in terms applicable to execution proceedings and according to the decision in *Balasubramania Chetti's case*,[7] S. 141 of the Code does not enable the application of such principles either.

As early as 1869, in a case under Ss. 207 and 208 of the Civil Procedure Code of 1859, *Haro Sankar Sandyal* v. *Tarak Chandra Buttacharjee*,[8] it was indicated that the proper test regarding the non-permissibility of piecemeal execution would be whether the decree was or was not *perfect* for execution in its *entirety*. Sir Barnes Peacock, C.J., stated: "Where a decree is perfect for execution in its entirety the execution creditor cannot take out one execution for one part (*e.g.*, wasilat) and another for another part (*e.g.*, costs), nor can he by assignment split it up and subject the judgment-debtor to a plurality of execution." A different test seems to be pointed out in *Ram Baksh Singh* v. *Madat Ali*,[9] where it was stated that "where a decree was of a *complex* character and granted *different kinds of relief to be obtained by processes of different kinds*

1. (1910) 2 K.B. 636, 641 (C.A.).
2. (1920) 2 K.B. 243 (C.A.).
3. The Yearly Supreme Court Practice, 1937, p. 753.
4. (1933) I.L R. 57 Bom. 468. 5. (1934) 38 C.W.N. 1058.
6. (1891) I.L.R. 18 Cal. 515. 7. (1913) I.L.R. 38 Mad. 199.
8. (1869) 3 Beng.L.R. (A.C.J.) 114.
9. (1875) N.W.P.H.C. Rep. 95.

there was no valid objection to separate applications for partial execution of the decree." This is an approximation to the English rule set out *supra*. Thus where a decree is for possession of land and mesne profits it will be competent to the decree-holder to execute such decree by means of separate and successive applications in respect of each relief, *Sadho Saran* v. *Hawal Pande*,[1] *Veeraraghava Rao* v. *Gurunadha Rao*.[2] The same principle was held to operate where a decree was for possession of land and costs, *Radha Kishen Lall* v. *Radha Pershad Singh*,[3] *Chunilal Seth* v. *Gulabchand*.[4]

Under either test where a decree is simple and grants reliefs to be obtained by process of the same kind, that is, where there is only one *homogeneous* relief such as money or costs a single execution will have to be taken out for the whole sum due. In *Panaji Girdharlal's case*,[5] the Bombay High Court held that a judgment for principal and interest is a single money decree and cannot be said to give different forms of relief and that the provisions in O. 21, rr. 10, 11, 15, proviso to r. 17, and r. 64 are a clear pointer that the correct rule and certainly the rule of convenience is that a party having a right to execute a decree for money presently payable must enforce the whole decree at the same time. The same view was taken in *Shyama Charan De Thabildar* v. *Protap Chandra Das*.[6] See also *Kusum Kamini Deby* v. *Sailes Chandra Chakrabarty*,[7] *Prakash Chandra Sarkar* v. *Pande Ramnarain*,[8] *Chunilal Seth* v. *Gulabchand*[4] Singularly enough in the last case it is stated that where in contravention of the principle enunciated above, piecemeal execution is sought it is the duty of the judgment-debtor to raise the objection to the maintainability of the very first E. P. and if he failed to do so he cannot thereafter challenge either the validity of that application or the competency of any later E.P. for the realisation of the unrecovered balance of the decree amount. A similar view has found expression in *Upendra Nath Bose* v. *K.B. Dutt*,[9] where it is stated that the mischief of piecemeal execution can apply only to the earlier execution and does not apply to the later one. As pointed out by Beaumont, C.J., in *Panaji Girdharlal's case*[5] this dictum overlooks the real question, namely, not whether the first application is objectionable but what its *effect* is. The decision in *Upendra Nath Bose's case*[9] goes further and holds that in a case where a decree had granted costs both of the trial and of the appeal to the High Court, and an application had been made in the first instance to recover the

1. (1898) I.L.R. 19 All. 98 (F.B.). 2. (1915) 2 L.W. 688.
3. (1891) I.L.R. 18 Cal. 515. 4. A.I.R. 1931 Nag. 89.
5. (1933) I.L.R. 57 Bom. 468.
6. (1930) 34 C.W.N. 907 (later E.P. for interest not claimed in the earlier E.P. was held incompetent).
7. (1934) 38 C.W.N. 1058.
8. (1917) 43 I.C. 186. 9. (1926) I.L.R. 53 Cal. 582.

High Court costs, a later E. P. to recover the costs of the trial Court will not be incompetent. The decisions of the Calcutta High Court thus disclose no uniformity of view and fully justify the remark in the instant decision that the question regarding the permissibility of piecemeal execution has not been finally settled in that Court. In Madras, in *Balasubramania Chetti* v. *Swarnammal*,[1] it has been held that a decree-holder can present successive applications for realising different portions of what he is entitled to under his decree and in *Somasundaram Pillai v. Chokkalingam Pillai*,[2] the principle has been held to justify an application in the first instance for restitution of an amount recovered under a decree subsequently reversed on appeal, and a later application for the recovery of interest on such amount for the period during which the decree-holder had the use of the money.

SHRIDAR BALKRISHNA *v.* THE POONA MUNICIPALITY, I.L.R. (1940) Bom. 837.

This decision deals with a question of considerable practical importance, namely, what is meant by an order of a Court which dismisses a suit with costs, there being more than one defendant appearing separately,—whether the defendants get separate sets of costs or whether there is to be only one set of costs to be shared between all the defendants. In England such a question does not arise in practice, because the orders of the Court are drawn up in a formal manner and if the judge says: "suit dismissed with costs" the order does not contain those exact words but directs that the plaintiff do pay the defendants their costs to be taxed. In India, the Civil Procedure Code does not contain any prescription in regard to this matter. S. 35 leaves costs to the discretion of the Court. O.20, r.6 merely declares that the decree shall state the amount of costs incurred in the suit and by whom and in what proportions such costs are to be paid. O. 41, r.35 (3) lays down a similar principle regarding appellate decrees. Thus if a suit stands dismissed with costs with nothing more being said and there are a number of defendants the scope of the order becomes a matter of judicial construction. While Beaumont, C.J., and Wassoodew, J., remark in the instant decision that construing such language in their natural and proper sense it can only mean that the plaintiff must pay to each defendant a separate set of costs affirming the view taken by Beaumont, C. J., and Lokur, J., in *Mariyaya Chanviraya v. Shantirappa Danappa*,[3] an earlier decision of the same High Court in *Rustomjee Heerjee Bhoy* v. *Cowasjee Dadhabhoy*[4] has declared that it was an *invariable* practice on the appellate side of the High Court that unless otherwise specifically directed on

1. (1913) I.L.R. 38 Mad. 199=25 M.L.J. 367.
2. (1916) I.L.R. 40 Mad. 780.
3. I.L.R. (1939) Bom. 478.
4. (1924) I. L. R. 48 Bom. 348.

an application made at the time the judgment is delivered in their favour with costs for the award of separate sets of costs, the order "appeal dismissed with costs" will mean that the losing party should pay one set of costs only to be divided among the successful parties. Likewise while the Calcutta High Court has held that when the Court orders the defendants speaking of them collectively to be paid their costs by the plaintiff it means that each defendant who appeared in the suit as a separate party is to be paid his separate costs—see *Gunesh Dutt Singh* v. *Mungay Ram Chowdhry*,[1] *Ramchunder Sen* v. *Koomar Doorga Nath Roy*[2]—the Patna High Court has in *Jagadish Prasad* v. *Mathura Prasad*[3] stated that when the judgment does not specifically award separate costs to the several defendants it cannot be taken to mean the award of such costs. The room for such conflicting views has now been considerably narrowed by the Fee Rules framed by the High Courts. The view of the Bombay High Court in the instant decision stands justified when understood in the light of the High Court Civil Circulars (p.196 of the Manual of Civil Circulars, 1925) containing directions as to when separate costs are to be allowed and when one set only is to be allowed when there are several defendants. One of the rules states that when several defendants having substantially one defence employ several pleaders they shall be allowed one set of costs only and that in such cases it will be for the plaintiff at the time of hearing to ask for a direction of the Court that separate costs be not allowed, and another rule lays down that when several defendants having separate defences are represented by separate pleaders they shall be entitled to separate costs.

In Madras the position is somewhat different. The rules framed regarding Practitioner's Fees under S. 27, Act XVIII of 1879, and kept in force even now, as well as rr. 12 and 13 of O. 6 of the O.S. High Court Fee Rules, 1933, enjoin that if several defendants who have a common interest succeed upon a joint defence or upon separate defences substantially the same, not more than one fee shall be allowed unless the Court shall otherwise order, and that if several defendants who have separate interests set up separate and distinct defences and succeed thereon a fee for one legal practitioner for each defendant may be allowed. Thus while in Bombay even where the several defendants set up substantially the same defence each defendant may get a separate set of costs unless the plaintiff applies to restrict the costs to one set only, in Madras, in such a case all the defendants will have to share one set of costs only unless on their application the Court has passed an order the other way.

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1. (1874) 21 W.R. 288. 2. (1878) 2 C.L.R. 152.
3. A.I.R. 1935 Pat. 41=154 I.C. 618.

SINNASWAMI GOUNDAN *v.* RAM GOUNDAN, (1941) 1 M.L.J. 519.

In this case it has been held that where a first mortgage is discharged by payments made at different times by two different persons, neither of whom would have been able to pay off the mortgage without the help of the other, there is no principle that it is only the person who makes the final payment in point of time that will be entitled to the right of subrogation and that both the persons can claim such right out of the sale proceeds of the mortgaged property. The conclusion is rested partly on the paucity of direct authority dealing with a similar situation (p. 522) and partly on equitable considerations. Clause (4) of S. 92 of the Transfer of Property Act merely lays down that a right of subrogation under that section shall not arise in favour of any person unless the mortgage in respect of which the right is claimed has been redeemed in full. This clause merely settles a point on which the decisions till then were somewhat conflicting and confirms the view taken by Mookerjee, J., in *Gurdeo Singh* v. *Chandrikah Singh*,[1] that subrogation could only be by complete redemption, *i.e.*, that subrogation could not be claimed so long as the mortgage is not redeemed in full.[2] There is however nothing in S. 92 which requires that the person claiming subrogation should himself have paid the entire amount of the previous debt, and in fact, cases have allowed subrogation when the prior mortgage has been discharged but only part of the money has been advanced by the subrogee, see *Rupabai* v. *Audimulam*,[3] *Saminatha* v. *Krishna*,[4] *Ram Sarup* v. *Ram Rachhpal*,[5] and *Abdul Razak* v. *Abdul Rahman*.[6] The English law also seems to be similar, namely, that if the whole debt be discharged it does not matter that some portion of it was paid by a third person.[7] If several persons pay separate sums which (taken together) discharge the first mortgagee they can get charges respectively in proportion to the amounts paid by them all in priority to the second mortgagee out of the sale proceeds of the mortgaged properties when they are sold outright, *Venkatarama Reddi* v. *Rangiah Chetti*.[8] It is not however stated whether such payments which cumulatively satisfy the first mortgage in full should have been substantially synchronous in point of time or whether the rule will govern even when the payments have been made in fact at different times and by different persons. The decision in *Hari Singh* v. *Jai Singh*,[9] relied on in the instant

1. (1909) I.L.R. 36 Cal. 193.
2. Mulla, Transfer of Property Act, 2nd Edition, p. 528. See also *Hanumanthaiyan* v. *Meenatchi Naidu*, (1911) I.L.R. 35 Mad. 183.
3. (1888) I.L.R. 11 Mad. 345.
4. (1915) I.L.R. 38 Mad. 458.
5. (1929) I.L.R. 51 All. 920. 6. (1933) 65 M.L.J. 390.
7. Jones on Mortgages, 7th Edition, S. 885 at pp. 438-439.
8. (1921) 41 M.L.J. 399 at 408.
9. I.L.R. (1937) All. 880 at 900 (F.B.).

decision is not really helpful. In that case three sets of vendees had purchased from the mortgagor different portions of the hypotheca and undertaken to redeem the first mortgage, which they did. In negativing their claim to subrogation, on the ground that the payments made by them were merely by way of fulfilling the obligations undertaken by them and that they had not obtained any agreement in writing registered regarding their right to subrogation, the learned judges remarked that otherwise the vendees who discharged the mortgage would have been entitled to rights of subrogation in proportion to the amounts paid by them if they had really redeemed the mortgage on their own behalf and come within the purview of the first paragraph of S. 92. Whether in so stating, the learned judges intended to declare that the right of subrogation can be claimed by each of the persons whose payments taken together brought about the redemption of the mortgage, irrespective of any question of the synchronous or successive character of such payments is difficult to infer. No doubt even where the payments by the three sets of vendees to the mortgagee were made on the same day, notionally, at any rate those payments might well be regarded as successive payments only and not as a single consolidated payment, as the learned judge in the instant decision points out. Any way, the observation in *Hira Singh* v. *Jai Singh*[1] is purely *obiter*. In Madras, the point has been dealt with in *Raja of Kalahasti* v. *Venkatappa Nayanim Bahadur*[2]—a decision of three learned judges in a Letters Patent Appeal—where it is declared that to claim subrogation the first requirement is that the mortgage must have been extinguished by a payment made *by the party claiming subrogation* and a person cannot stand by till the mortgage is extinguished by somebody else and then claim such charge. It follows therefore that where the extinguishment of the mortgage did not take place by the payment of the party claiming subrogation but by the payment made by some one else the former's claim is unsustainable. Judged by that test the conclusion reached in the instant decision would not be right and the person who had made the earlier payment can have no right of subrogation out of the sale proceeds of the mortgaged properties when they were sold outright. The observations in *Raja of Kalahasti* v. *Venkatappa Nayanim Bahadur*[2] being in favour of a view opposed to that adopted in the instant decision, a fuller consideration of the question is certainly to be desired.

NARAYANA GAJAPATHI RAJU BAHADUR *v.* JAGGAYYA, (1941) 1 M.L.J. 523.

This decision expounds *inter alia* the nature of the right of eviction available to a landholder under the provisions of the

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1. I.L.R. (1937) All. 880 (F.B.). 2. (1928) 27 L.W. 544 at 567.

Madras Estates Land Act. S. 9 enjoins that a landholder cannot eject a ryot except in accordance with the provisions of the Act, from the holding or any part thereof, and S. 151 enables the landholder to apply for the eviction of a ryot only on the ground that the ryot has materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes. Though it is the conjunction *and* and not the disjunctive *or* that is used in the latter section, still it is clear that the two phrases " materially impairing the value of the holding " and " rendering it substantially unfit " really imply the same idea and run into each other. This view is strengthened by S. 11 which declares that a ryot may use the holding in any manner which does not materially impair the value of the land or render it unfit for agricultural purposes, and by S. 187 (1) (*b*) which provides that no contract between the parties, at whatever time made, shall take away or limit the right of a ryot to use the land as provided by S. 11. The right of eviction in favour of a landholder can thus arise only if the holding has been materially impaired or made substantially unfit for agricultural purposes, *i.e.,* where there has been a *diversion* of the land from the main purpose of the holding to non-agricultural purposes, see *Narayana Rao* v. *Zamindar of Muktyala Estate*.[1] It is not possible to define with meticulous precision what would amount to a diversion of the holding from agricultural purposes. The question will be really one of fact dependent on the circumstances of individual cases, the size of the holding, the area withdrawn from agricultural purposes and the effect of such withdrawal upon the fitness of the holding *taken as a whole* for profitable cultivation, *Hari Mohan Misser* v. *Surendra Narayan Singh*.[2] If the holding as a whole is affected, then it would be immaterial whether the alleged acts of impairment were actually done over the entire holding or over parts of it only, *Rama Chetty* v. *Arunachalam Chettiar*.[3] It is however only a diversion *already effected* that can bring about a forfeiture of the holding and not a mere possibility or even the certainty of a diversion though in the near future, *Narayana Rao* v. *Zamindar of Muktyala Estate*.[1] Whether the erection of a structure or building in any part of the holding will amount to a diversion of the land from agricultural purposes will depend not only on the extent of the building, but the purposes which it is intended to serve, the object with which the building is raised and the various measures that are taken in respect of the land, *Narayana Rao* v. *Zamindar of Muktyala Estate*.[1] The conversion of one

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1. (1928) I.L.R. 51 Mad. 478=54 M.L.J. 621.
2. (1907) I.L.R. 34 Cal. 718=17 M.L.J. 361 (P.C.)—case under S. 23 of the Bengal Tenancy Act corresponding to S. 11 of the Estates Land Act.
3. (1914) I.L.R. 39 Mad. 678=29 M.L.J. 724.

forty-eighth of a holding into a building site by enclosing that part with walls, by raising the level of that part of the holding and by raising two pillars to support a superstructure will not sustain a right to evict, *Rama Chetty* v. *Arunachalam Chettiar*,[1] *Sankaralinga Moopanar* v. *Subramania Pillai*.[2] Likewise the use of less than one-twentieth of the entire holding for constructing a building and for housing cattle and storing manure will be unobjectionable, *Zamindar of Seithur* v. *Dorai Venkataraju*.[3] The making of a *bandh* to prevent influx of salt water into the holding,[4] the erection of a masonry structure for dwelling on an insignificant portion,[5] the digging of a tank which was a practical necessity,[4] etc., will be acts of legitimate user and as such will not enable the landholder to eject the ryot. The construction of a cremation ghat[6] or the erection of a mosque[7] on the holding will not be acts of legitimate user and may give rise to liability of being evicted. The diversion of one out of two and one-third acres of land forming a holding for erecting a pucca residential house and a compound therefor will also amount to a diversion of land from agricultural purposes as would justify an eviction, *Narayana Rao* v. *Zamindar of Muktyala Estate*.[8] The user of one-sixteenth of a holding for the purpose of raising a building to store grain will not be objectionable as pointed out in the instant decision provided the storing is of the crop raised on the holding itself. The instant decision lays down a noteworthy principle in stating that in construing S. 151 the Courts have nothing to do with the policy of rural reconstruction and that a tenant cannot be permitted to take the law into his own hands and plead.

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1. (1914) I.L.R. 39 Mad. 675=29 M.L.J. 724.
2. (1915) 29 M.L.J. 514.
3. (1939) 1 M.L.J. 483.
4. *Raja Sati Prasad Garga* v. *Manmathanath Kar*, 6 I.C. 291.
5. *Naran Chandra Dalal* v. *Manindra Chandra Nandi*, 37 I.C. 999; *Hari Kisore Barna Sarma* v. *Barada Kishore*, I.L.R. 31 Cal. 1914.
6. *Dhirendra Kumar Roy* v. *Radha Charan Roy Chowdhury*, 57 I.C. 758.
7. *Srish Chandra Ganguly* v. *Ersum Musalli*, (1934) I.L.R. 61 Cal. 75.
8. (1928) I.L.R. 51 Mad. 478=54 M.L.J. 621.

SHANKER VISHNU *v.* MANEKLAL HARIDAS, I.L.R. (1940) Bom. 799.

This case decides an interesting point in regard to the efficacy and operative character of an order of discharge of a debt passed under the provisions of the Central Provinces Debt Conciliation Act II of 1933, outside that province. It holds that where a promissory note was executed at a place within the Bombay Presidency—the promisor as well as the promisee being residents of that place—in a suit to recover the debt on that note brought in the Bombay Courts, a plea of discharge by virtue of an order passed by a Debt Conciliation Board in the Central Provinces functioning in the area wherein the debtor had some lands, will be no defence to such suit. Section 4 of the C.P. Act states that a debtor may apply to the Board appointed for the area in which any holding or land of the debtor is situate to effect a settlement between the debtor and his creditors.[1] On such application, if the Board deemed that a settlement was desirable, notice to creditors was to issue according to S. 8 requiring them to submit a statement of the debts owed to them by the creditor,[2] and sub-S.2 lays down that every debt of which a statement is not submitted shall be deemed " for all purposes and on all occasions " to have been duly discharged.[3] Section 16 declares that no civil Court shall entertain any suit in respect of the recovery of any debt which has been deemed to have been duly discharged under S. 8 (2).[4] The debtor in the instant decision taking advantage of the C.P. Act by virtue of his owning some lands in that province applied under S. 4 for a settlement of his debts; the creditor received a notice but failed to submit any statement as required by the Act and thereupon the Debt Conciliation Board declared the debt to be discharged. Now it is well settled that the *lex loci contractus* governs the rights and incidents flowing out of contracts ordinarily. One of the incidents so governed is the discharge of contracts. If under the law of the place where the contract was entered into, namely, in this case the law obtaining in the Bombay Presidency, the contract can be discharged by a mode other than performance, such a discharge will be recognised and be binding on the Courts of that province. The true rule as explained by Dicey is: " a debt or liability arising in any country may be discharged by the laws of *that* country and such a discharge, if it extinguishes the debt or liability and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in Courts of that country but in every other country".[5] *Prima facie,*

1. *Cf.*, S. 4 of the Madras Debt Conciliation Act.
2. *Cf.*, S. 10 (1), *ibid.*
3. *Cf.*, S. 10 (2), *ibid.*
4. *Cf.*, S. 19 (4), *ibid.*
5. Conflict of Laws, 5th Edition, p. 504.

therefore, the discharge of a debt incurred in the Bombay Presidency by residents of that Presidency in a mode not provided or recognised by the laws of that province will be no answer to an action on the debt. On this subject S. 37 of the Indian Contract Act has provided that the parties to a contract must perform their promises "unless such performance is dispensed with or excused under the provisions of this Act or *of any other law.*" As pointed out by Wort, J., in *Sadanand Jha* v. *Aman Khan*,[1] the section itself provides for a possible dispensation to the parties to the contract as appears from the latter part of the section, and thus in cases in which the facts come within the provisions of the Usurious Loans Act strict performance is excused. The most important statutory discharge of contracts outside the Indian Contract Act is that which follows on bankruptcy.[2] The expression "any other law" in S. 37 has nowhere been defined. Still it is clear that it can refer only to a law passed by a competent legislative authority with reference to India, co-ordinate with or superior to that which passed the Act; in other words the law must be one having an all-India operation territorially. The C.P.Debt Conciliation Act is professedly an enactment which extends to the whole of the Central Provinces only.[3] Bombay and the Central Provinces are both of them no doubt part of British India but as pointed out in the instant decision where the law of one province is distinct from the law of another province, the two provinces have to be regarded for this purpose as foreign countries *inter se.* It therefore follows that a mode of discharge of contracts recognised by the law of one province cannot in any manner affect a contract entered into in a different province when there is nothing to indicate that the incidents of the contract were not to be regulated by the law of the place where the obligation was incurred. Thus the discharge granted to the debtor by the C.P.Debt Conciliation Board cannot preclude the recovery of the debt due through the Courts in Bombay under the Bombay law which was the law applicable to the case having regard to the fact that the promissory note was executed in the Bombay Presidency and both the parties to the transaction were residents of that province.

VELAYUDHAM PILLAI *v.* SUBRAMANIA PILLAI, (1941) 1 M. L. J. 617.

This case attempts to indicate the precise scope of the Full Bench ruling in *Rama Rao* v. *Venkataramayya*,[4] deciding that

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1. (1938) I.L.R. 18 Pat. 13 at p. 41 (F.B.).
2. *See* the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920.
3. Section 1 (2) of the C.P.Debt Conciliation Act.
4. (1940) 2 M.L.J. 257=I.L.R. (1940) Mad. 969.

certified copies of returns made by an assessee to the Income-tax Officer were admissible in evidence. It holds that there is no warrant to regard the Full Bench ruling as countenancing the view that it is obligatory on an assessee to obtain and produce to the opposite party in a suit copies of the returns, if the opposite party desires to inspect them. Order 11, r. 14 of the Civil Procedure Code deals with the Court's power to order production of documents and corresponds to O. 31, r. 14 of the Rules of the Supreme Court which is couched in almost similar terms. Under these rules it will be lawful for the Court in the exercise of its discretion to order the production by either party to the action of such of the documents in his possession or power relating to any matter in question in such cause. On the language it is clear that no order for production can be made against a party unless the document is in his possession or power, *Rameswar* v. *Rikhanath Koeri*,[1] *Laxman Rao* v. *Gayadin*,[2] and such possession must be sole legal possession, *Kearsley* v. *Phillips*,[3] *Coomes* v. *Hayward*.[4] An income-tax return made to the Income-tax Officer not being a document in the possession or power of the assessee, it follows that an order under O. 11, r. 14 of the C.P.Code cannot be made against him. That apart, S. 54 (1) of the Indian Income-tax Act declares the particulars contained in an income-tax return to be confidential and provides that no Court shall require except in the specified cases any public servant to produce such a document and sub-S. (2) penalises the disclosure of such particulars. It is inevitable that a Court of law should approach in a critical spirit any legislation which is calculated to impede a Court in the discharge of its duty to administer justice by preventing it from obtaining any material evidence of a nature likely to assist it to ascertain the truth, *Rowell* v. *Pratt*.[5] But at the same time the Court will have regard to the essential spirit underlying the prohibition in considering its scope, namely, that the foundation of the prohibition is that certain information cannot be disclosed without injury to the public interest, *Asiatic Petroleum Co.* v. *Anglo Persian Oil Co.*[6] Applying these principles, in *Shaw* v. *Kay*,[7] where the pursuer endeavoured to obtain production of the defender's income-tax returns for the purpose of proving that he was in a position to repay a loan, the Court of Session (Lord Pearson) held that the Court could not order such production on the ground of "confidentiality and public interest". For similar reasons

1. A.I.R. 1920 Pat. 131, 186.
2. I.L.R. (1937) Nag. 266; *see also* Bray's Digest, Arts. 31 and 32.
3. 10 Q.B.D. 36, 40; *Ibid.*, 486 (C.A.).
4. (1913) 1 K.B. 150.
5. (1938) A.C. 101, 104.
6. (1916) 1 K B. 822.
7. (1904) 5 Tax Cases 74.

in *Ankin* v. *London and North Eastern Railway Co.*,[1] the production of reports made in pursuance of S. 6 of the Regulation of Railways Act, 1871 (34 and 35 Vict., c. 78) to the Minister of Transport by the Railway Officials in regard to injuries sustained by a railway passenger was declined to be ordered on an application by the injured party for such production. Likewise in *Rowell* v. *Pratt*,[2] it was held that a return made to the Potato Marketing Board set up by the Agricultural Marketing Act, 1931, by a grower, was privileged from production in legal proceedings by virtue of S. 17 (2) of the Act. The test employed in all these cases would seem to be whether the communication or document of which production is sought is one which the public interest requires should be kept confidential. If the test is satisfied, the secrecy attaching to the document will be deemed to be applicable if production is called for in a legal proceeding even if the legislature has not specifically so stated, see *Rowell* v. *Pratt*.[3] As pointed out in (1940) 2 M.L.J. 25 at p. 26 (N.I.C.) no policy of the law would be defeated where the very person who made the return proposes to prove its contents. Totally different considerations will however arise where it is a stranger to the return that wants to avail himself of it and against the maker of it and for that purpose seeks to compel the latter to procure a copy of the return from the authorities and produce the same. Certified copies of income-tax returns will no doubt be available to an assessee by reason of r. 99 of the Income-tax Rules while it will not be available to others, but the very confidential character of the document requires that its contents ought not to be divulged to the detriment of the assessee or against his wishes.

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1. (1930) 1 K.B. 527.
2. (1938) A.C. 101.
3. *Ibid.*, p. 118 (per Lord Maugham).

SUBBARAMAYYA *v.* VENKATASUBBAMMA, (1941) 1 M.L.J. 724.

One of the questions in the Questionnaire issued by the Hindu Law Committee recently appointed by the Government of India is: "Should any provision be made to place the legality or otherwise of anuloma or other inter-caste marriages beyond doubt?" The justification for the question is made apparent by the decision under notice which almost for the first time in 35 years after the pronouncement of the Allahabad High Court in *Padam Kumari* v. *Suraj Kumari*,[1] dealing directly with the point, decides that an anuloma marriage is at the present time altogether invalid and suggests that if a change in the law is felt necessary we can look only to the Legislature. The conclusion in the Allahabad case lent itself to the criticism that it had been reached without any elaborate examination of authorities; the same cannot be said of the instant decision which deals with most of the materials available on the point though cases like *Melaram Nudial* v. *Thanooram Bamun*,[2] *Ram Lal Shookool* v. *Akhoy Charan Mitter*,[3] *Khairu* v. *Fakir Chand*,[4] *Nalinaksha Majhi* v. *Rajani Kanta Das Mohanta*,[5] *Suran Chand* v. *Indar*,[6] and *Appibai* v. *Khimji Cooverji*[7] which touch and consider the question have not been referred to. The decision under notice is also noteworthy in that it seems to be the first unequivocal pronouncement within the last two decades to reject the view in favour of the validity of anuloma marriages which had found acceptance with the Bombay, Calcutta, Madras and Lahore High Courts ever since the decision in *Bai Gulab* v. *Jiwan Lal*.[8] According to the instant decision an anuloma marriage is no longer valid because of the following reasons: (1) the absence of general consciousness of Hindu Society about the validity of such marriages, (2) invariable usage not to permit such marriages at least for a thousand years past, (3) the ripening of the recognition *cum* condemnation of such marriages by the Smritis into a definite prohibition by the time of the Puranas, and (4) the refusal by works like the Smriti Chandrika even to discuss the rights of anulomajas indicating a definite popular consciousness at the time when they were written or compiled that such sons had no status whatever.

The utility of identity of caste in marriage consists in the attainment of an unseen result (dharma). In such cases a principle of the Mimamsa states that "no substitute is to be allowed with regard to the unseen aspect of the prescribed ori-

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1. (1906) I.L.R. 28 All. 458.
2. (1868) 9 W.R. 552.
3. (1903) 7 C.W.N. 619.
4. (1909) 2 I.C. 944.
5. (1931) I.L.R. 58 Cal. 1392.
6. A.I.R. 1934 Lah. 550.
7. (1934) I.L.R. 60 Bom. 455.
8. (1921) I.L.R. 46 Bom. 871.

ginal''.[1] Thus strictly speaking there can be no possibility of substituting a bride belonging to a different caste for one belonging to the same caste. Again, when there is a prohibition in the sacred texts of the doing of any particular thing, if such prohibition is only implied, a counter-enjoining may be provided though only secondarily but if the prohibition is direct no counter provision will be admissible. The question therefore will be whether marriage is regarded exclusively as a training in dharma, and whether the prohibition, if any, in the Shastras of anuloma marriages is express and explicit or merely implied. The object of marriage is really fourfold, namely, enjoyment, birth of a son, eligibility to perform religious duties and attainment of *asrama*. This has been recognised by the Shastras, as is apparent from the very provisions for different types of marriages like Brahma, Gandharva, etc. It is practically indisputable that the Smritis while contemplating anuloma marriages at the same time disapprove of them, as for instance, by remarking that such marriages are only for conjugal felicity and not for religious duties. While Manu at one place allows anuloma marriages,[2] by the very next verse he condemns the marriage of a Sudra woman with a member of any other caste. It is possible to construe the condemnation not as a prohibition (निषेध) but as giving an option (विकल्प) by the application of the maxim विरोधे तु विकल्पः ।. Medhatithi and Kulluka have in fact so read the texts. Narada,[3] Vishnu,[4] Vasishta[5] and other Smriti writers also allow anuloma marriages. The Dharma Shastra of Yagnavalkya however expresses more than a mere disapproval of such marriages.

यदुच्यते द्विजातीनाम् शूद्राद्दारोपसंग्रहः ।
नैतन्मम मतं यस्मात्तत्रायं जायते सुतः ॥

—What has been stated (by Manu and others) regarding a twice-born taking a bride from a Sudra (family), that is not my doctrine, because he is born again in his son.[6] The fact that other verses[7] show that if at all a person is inclined to depart from such doctrine he can do so on the lines indicated in those verses, or that certain verses[8] prescribe the mode in which anuloma marriages may be celebrated, or that some verses[9] specify the appellations to be borne by the different classes of anulomajas, or that anulomajas are stated to be *santa* (good) while pratilomajas are declared *asanta* (non-entities)[10] or that provisions are to be found as to the mode in which anulomajas are to share the patrimony[11] cannot in any way detract from the censure of anu-

1. Mimamsa, V, vi, 8. 2. III, 18. 3. XIII, 5.
4. XXIV, 4. 5. Ch. VIII, S. 1-3. 6. I, 56.
7. I, 57. 8. I, 62. 9. II, 91, 92.
10. II, 95. 11. II, 125.

loma marriages indicated in the earlier text of that sage. Even as Yagnavalkya has more pronounced views on this question than the other Smritikars, so also the Smriti Chandrika among the later commentaries has adopted an almost hostile attitude towards such marriages refusing even to discuss the rights of anulomajas. It is conceded by Shah, J., in *Bai Gulab* v. *Jiwan Lal*[1] that anuloma marriages would be invalid if *prohibited* by the texts but not if they are merely *obsolete*. The learned judge however came to the conclusion that there was no prohibition whatever. On the other hand Somayya, J., in the instant decision points out that when an institution is shown to be obsolete there is no necessity to go further and show that there is an express prohibition against such an institution either in the law books or in usage having the force of law. He also expresses the opinion that if a prohibition is in fact necessary such a prohibition is also found at any rate in commentaries like the Smriti Chandrika. In this connection it may be noted that in *Sambasivan* v. *Secretary of State*,[2] in considering the text of Yagnavalkya postulating the right of a preceptor or pupil to succeed to the property of a man dying without heirs, the Madras High Court observed that though the claim was novel so far as the Courts were concerned, a direction of the texts could not be ignored as obsolete and negligible when it involved no inequity or conflict with modern ideas. The proper approach therefore to the question of the validity of anuloma marriages at the present time would seem to be to ascertain whether in the particular locality or among the community concerned the institution stands rejected at the present time. The observation of Chandavarkar, J., in *Bai Kashi* v. *Jamnadas*,[3] that it was reasonable to infer that according to the leading authorities on Hindu law as recognised in the Presidency, a Sudra wife is not permitted to a Brahmin, a Kshatriya, or a Vaisya" purports to state nothing more than what according to him is deducible from the *authorities* and does not refer to the existence of any *usage or consciousness* among the castes of the validity or invalidity of such marriages. In *Bai Gulab* v. *Jiwan Lal*,[1] it is remarked that while there may be disapproval of anuloma marriages there has been "no usage proved like any other fact" refusing to recognise marriages outside the caste. The decision in *Natha Nathuram* v. *Mehta Chotalal*[4] is also on the same lines. Judicial opinion in Calcutta which originally was against the validity of anuloma marriages except where they had been sanctioned by local usage is now inclined to treat such marriages as valid under Hindu law unless prohibited by usage. In *Melaram Nudial* v. *Thanooram Bamun*,[5]

1. (1921) I.L.R. 46 Bom. 871, 878.
2. (1921) 41 M.L.J. 109 : I.L.R. 44 Mad. 704.
3. (1912) 14 Bom.L.R. 547.
4. (1930) I.L.R. 55 Bom. 1.
5. (1868) 9 W.R. 552.

it was held that in regard to a marriage between a Brahmin male and a non-Brahmin girl, "local custom is the only authority by which such a marriage can be sanctioned, *the general Hindu law being against it*". In *Ram Lal Shookool* v. *Akhoy Charan Mitter,*[1] the view was taken that "the ancient Hindu law did not regard such marriages with the condemnation expressed by later authorities" and that such marriages being recognised by local custom would be valid. But in *Nalinaksha Majhi* v. *Rajanikanta Das Mohanta,*[2] it is stated that "a marriage between a Brahmin and a Sudra woman...though not an approved type of marriage is still a marriage and the children are legitimate". In the Punjab, anuloma marriages have been held to be valid both by reason of custom as also under Hindu law. In *Suram Chand* v. *Indar,*[3] Jai Lal, J., states: "the tendency of the Courts appears to be to recognise such marriages as valid and this tendency is consistent with the ordinary rule that unless clearly proved to the contrary the decision should be in favour of legality of connection between man and woman specially if the intention of the parties was to treat it as a marriage". The only decision in Madras on the validity of anuloma marriages is that of Venkatasubba Rao, J., in *Ratansi Morarji* v. *Administrator-General of Madras.*[4] This decision purports to rest on the rulings of the Bombay High Court in *Bai Gulab* v. *Jiwan Lal*[5] and *Bai Kashi* v. *Jamnadas.*[6] The efficacy of the decision is to some extent marred by an erroneous statement on p. 173 that "Chandavarkar, J., in *Bai Kashi* v. *Jamnadas,*[6] after an examination of the Smritis and Commentaries, also arrives at the conclusion that anuloma marriages are valid". Chandavarkar, J., in fact has indicated a view the other way. Among the text writers on Hindu law, while it is stated in Mayne's Hindu Law[7] that the only legal course is to treat anuloma marriages as invalid except where there is custom or enactment to the contrary, Sarkar Sastri's Hindu Law[8] propounds not merely a contrary view but declares further that even pratiloma alliances will be valid. Thus it is stated on p. 120: "The sages recognise marriage between a woman of an inferior caste and a man of a superior caste to be valid....Although marriage of an inferior man with a superior woman may be disapproved and condemned, still if such a marriage does in fact take place the same must be regarded as valid as between the parties to it and the issue legitimate. They may be ex-communicated and excluded from inheritance of their

1. (1903) 7 C.W.N. 619.
2. (1931) I.L.R. 58 Cal. 1392, 1399.
3. A.I.R. 1934 Lah. 550, 553.
4. (1928) 55 M.L.J. 478 : I.L.R. 52 Mad. 160.
5. (1921) I.L.R. 46 Bom. 871.
6. (1912) 14 Bom.L.R. 547.
7. 10th Edition, p. 127.
8. 8th Edition.

relations, but as between themselves the relationship of husband and wife, and of parent and child must be held legitimate and there must also be reciprocal heritable right among themselves—*there being no authority for pronouncing the marriage to be invalid however reprehensible the same may be represented to be.*"

That the instant decision takes a view contrary to that held by Courts during the last twenty years is clear; that it affects a question of status and as such is bound to have wide repercussions cannot be gainsaid. It is therefore up to the Legislature to resolve this conflict of judicial opinion.

DAMEL v. MANMOHANDAS LALUBHAI, I.L.R. (1940) Bom. 153.

The question at issue in this case was whether Hindu coparceners governed by the Mithakshara law, carrying on a joint family business, can institute in their individual names a suit to recover a debt on a promissory note obtained in the name of the family firm. The matter arose on a suit being brought for the recovery of the amount due under a promissory note executed in favour of a joint family business, by a member of the family to whom on partition the note had been allotted. The learned judges posit a difference between the case of a promissory note in favour of a joint family firm and the case of a note in favour of an ordinary coparcenership taken in the name of the manager or any other member of the family, holding that in the former case an action on the note will *always* lie by the coparceners whereas in the latter case it is only the payee named in the note or any person to whom it has been endorsed or assigned that can sue on it. In other words, in the former case after partition any member to whom the note has been allotted can sue on it without the necessity for any endorsement or assignment in his favour by the other members of the firm provided all of them are arrayed as parties in the action, but in the latter case a coparcener not being the maker, to whose share the note has fallen at the partition cannot sue on it in the absence of any endorsement or assignment of it in his favour by the other members of the family. Certainty is no doubt the hall-mark of a promissory note, *see* Ss. 8, 32, 78 of the Negotiable Instruments Act. "Holder" is defined in S. 8 as any person *entitled in his own name* to the possession of the note and to receive or recover the amount due thereon. S. 32 declares the liability of the maker of the note to pay according to the *apparent tenor of the note* and S. 78 lays down that payment of the amount due should be to the *holder of the instrument*. The cumulative effect of these provisions is *prima facie* that it is only the person named in the promissory note as the payee, or an endorsee or assignee thereof

that can maintain an action on the note, apart from the debt evidenced by it, though the title of the holder need not be that of the owner. The instant decision holds that the words "in his name" in S. 8 do not mean the personal name of the person and an *alias* or an assumed name will fall within the meaning of those words. A firm has in fact no independent entity apart from the partners and a suit by the firm is really a suit by all the members of it, see *Brojo Lal Saha Banikya* v. *Budh Nath Pyarilal and Co.*[1] Where the firm is dissolved even then a decree on the note can be given in its favour if all the members of the firm are made parties to the action. Where however the note is allotted to the share of any one member it is difficult to see how his position will be different from that of a member of a joint Hindu family to whose share at a family partition a promissory note in favour of the joint family has been allotted, with reference to the maintainability of an action on such note and the obtaining of a decree in his favour, without any assignment or endorsement on the part of the other members of the family, even if a strict construction of S. 78 is favoured. Anyway it is submitted that there is no warrant for drawing a distinction between these two classes of cases in this respect.

On the construction of Ss. 8 and 78 there have been two schools of judicial opinion. The equitable view has found expression in *Brojo Lal Saha Banikya* v. *Budh Nath Pyarilal and Co*[1] where it has been remarked that it would be going too far to say that S. 78 of the Act "prohibits any person other than the holder to bring a suit, if that person is the true owner. If that were the intention of the Legislature..... it would have been quite simple to state that 'no person except the holder would be entitled to institute any suit on the instrument'. No such thing has been stated in any portion of the Act".[2] A stricter view, namely that the holder of the note is alone entitled to sue on the note has been taken by certain other decisions.[3]

Even if the latter construction of S. 78 is the correct one, endorsement and assignment are not necessarily the only modes by which the right to sue on the promissory note can arise. The

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1. (1927) I.L.R. 55 Cal. 551.

2. See also *Sarjug Singh* v *Deosaran Singh*, A.I.R. 1930 Pat. 318, *Surajman Prasad* v. *Sadanand*, A.I.R. 1932 Pat. 34, *Ramnagina Prasad* v. *Bishwanath Prasad*, A.I.R. 1934 Pat. 85, *Sewa Ram* v. *Hoti Lal*, (1931) I.L.R. 53 All. 5.

3. *Ramanuja Aiyangar* v. *Sadagopa Aiyangar*, (1904) 15 M.L.J. 249 : I.L.R. 28 Mad. 205, *Subba Narayana Vathiyar* v. *Ramaswami Aiyar*, (1906) 16 M.L.J. 508 : 30 Mad. 88, *Harkishore Barna* v. *Gura Mia Chaudhuri*, (1930) I.L.R. 58 Cal. 752, 755, *Krishnaji* v. *Hanmaraddi*, (1934) I.L.R. 58 Bom. 536, 542, *Virappa* v. *Mahadevappa*, (1934) 36 Bom.L.R. 807.

property in the promissory note may stand transferred by an award of arbitrators or by a proper partition or family arrangement, and the person taking the promissory note in that way may sue on the note and obtain a decree thereon making the other members of the family defendants in the action, without the necessity of alleging the cause of action as the original debt evidenced by the promissory note. As pointed out in *Subbarayudu* v. *Subbarayudu*,[1] where the question was whether a suit on a promissory note was maintainable by a person to whom it was allotted by an award of arbitrators made in a dispute between him and the payee under the note, in the absence of an endorsement in his favour by the latter: "the award operated as a transfer *inter alia* of the suit promissory note .... from the payee mentioned therein to the plaintiff..... There can be no doubt that the effect of the award which allotted the suit promissory note to the share of the plaintiff was to transfer the property in the suit promissory note to the plaintiff and the plaintiff is therefore entitled as the owner to maintain the suit on the promissory note" though there was no endorsement. In *Chinna Chenchu Reddi* v. *Subbaraya Chetti*,[2] following *Gopalu Pillai* v. *Kothandarama Aiyar*,[3] it has been observed that where in a partition in a joint family, a debt evidenced by a promissory note falls to the share of a member he can sue to recover the amount due under the promissory note without any endorsement of the note over to him or an assignment under S. 130 of the Transfer of Property Act and that the suit may be regarded as a suit on the original debt itself irrespective of the note. The Bombay decisions have however held otherwise. In *Krishnaji* v. *Hanmaraddi*,[4] where a promissory note had been passed in favour of the plaintiff's father in his individual name and there had been no renunciation of the world completely by the father so as to be considered civilly dead nor any endorsement or assignment by him of the note in favour of his son the plaintiff, it was held that a suit by the son on the note would be incompetent. Similarly in *Virappa* v. *Mahadevappa*,[5] where a promissory note passed in favour of the plaintiff's son was allotted to the share of the plaintiff on partition made by an award on which a decree was passed and there was no endorsement in plaintiff's favour of the note, it was held that there was no transfer of the note by operation of law, that no decree could be passed in favour of the plaintiff, but inasmuch as his son was impleaded as a party a decree on the note could be passed in favour of the son. This view suggesting that no suit on the *note* will lie in the ab-

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1. 1935 M.W.N. 282.
2. 1937 M.W.N. 184.
3. (1934) 67 M.L.J. 848.
4. (1934) I.L.R. 58 Bom. 536.
5. (1934) 36 Bom.L.R. 807.

THE
MADRAS LAW JOURNAL.

I] JANUARY. [1941

OURSELVES.

WITH this issue our Journal enters upon its fifty-first year. We take this opportunity to thank our subscribers —both those on the Bench and those at the Bar—for the warm encouragement and support they have given to us all these years and to express the hope that the same will be continued hereafter in an even larger measure. We are also glad to express our sense of gratitude to the Honourable the Judges of the High Court for the facilities they have been good enough to extend to us. Practitioners of law are compelled to keep themselves *au courant* with what is decided in the Courts ; further, the field of law is very wide and there are innumerable questions which admit of discussion from more points of view than one ; and these afford justification for the existence of a Journal like ours. It has been one of the chief features of our Journal not merely to report decisions but also to provide comments on leading cases and legislative measures and to publish critical articles on topics of interest to the legal public. It has also been our constant endeavour to report in these pages as far as possible only such decisions as may fairly be described to be " considered judgments

which do more than merely follow existing precedents." It may be that on *some* occasions we might be deemed to have departed from this standard and reported cases which need not have been reported. But the opposite view cannot be wholly ignored. As Lindley, L.J., put it "it must be borne in mind that the reports are wanted not only by men who are already well informed lawyers, but also by men of a different class; and for their sakes it is better to err on the side of reporting too many cases than of reporting too few." The main lines of our Journal still remain as they were laid down by the founders and though the help and guidance of those pioneers are no longer available to us the precious lessons of their work and the benefit of their labours are there to serve as a beacon light to us and it shall be our aim to make the Journal continue to live up to its ideals and traditions.

We shall be publishing in the course of this month a Special Number of our Journal in commemoration of this occasion.

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MADRAS LAW JOURNAL.

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NOTES OF RECENT CASES.

Krishnaswami Aiyangar, J.
3rd December, 1940

Raju Chettiar and others *v.* Ramakkal and others.
C. M. A. No. 45 of 1939.

Civil Procedure Code (*V of* 1908), *O.* 17, *r.* 1 *and O.* 33, *r.* 8—*Suit* in forma pauperis—*Trial—Plaintiff not ready—Grant of adjournment conditional on paying day costs within next hearing—Costs not paid—Power of Court to dismiss suit—Pauper, if exempted from payment of adjournment costs.*

In a suit filed *in forma pauperis,* the plaintiff was not ready at the date of the hearing and the Court adjourned the case on condition of the plaintiff paying day costs to the defendants within the next hearing date. On the adjourned date, the plaintiff did not pay the costs.

Held, the Court has jurisdiction under O. 17, r. 1, C.P Code, to pass a conditional order of adjournment on payment of costs by the plaintiff on failure of which the suit should straightaway be dismissed. 21 M. 408; A.I.R. 1928 M. 786, followed.

Held, further, that under O. 33, r. 8, a pauper plaintiff is not exempted from the payment of costs of adjournment; the Court has therefore power to direct him to pay the costs of an adjournment granted at his instance. 6 B. 561, followed; 47 B. 104, not followed.

K. Raja Aiyar and *V. Seshadri* for Appellants.

R. Desikan for *G. K. Damodara Rao* for Respondents.

K.S.

Wadsworth, J.
5th December, 1940.

M. Achuthan Nair *v.* T. Achuthan Nair.
C. R. P. No. 1315 of 1938.

Limitation Act (*IX of* 1908), *S.* 25—*Scope—Promissory note bearing both English date and Vernacular date—Inconsistency—Computation of time for limitation—Evidence as to date of note—Admissibility—Evidence Act, S.* 96

A promissory note bore both the English date 16—11—1934 and the Malayalam date Thulam 30, 1110, corresponding to 15th November, 1934. In a suit on the promissory note filed on 16—11—1937,

Held, that S 25 was not applicable. There is no presumption as to whether the vernacular or the Gregorian calendar is to be taken into account. S 25 only says that the date must be computed according to the Gregorian calendar, As there has been a dispute as to the date on which

the promissory note was executed the Court was entitled under S. 96, Evidence Act, to decide as to when the suit promissory note was executed.

A. Achuthan Nambiar for Petitioner.

K. S Sundaram for Respondent.

K.S

Wadsworth, J.
5th December, 1940

Vunnava Rangayya *v.* Panchayat Board, Angalakudur by its President.
C. R. P. No 988 of 1938.

Madras Local Boards Act (*XIV of* 1920), *Ss.* 212 *and* 168—Kolagaram *tax—Farming of right to collect—Legality.*

The Local Boards Act does not expressly or impliedly authorise the farming out the right to collect any tax levied under the Act (though license fees may be farmed out under Ss. 168 and 212 of the Act) and therefore such farming out must be taken to be prohibited. 36 Mad. 118 and 21 M.L.J. 788, followed.

A. Lakshmayya for Petitioner.

N. V. B. Sankara Rao for Respondent.

K.S.

[F. B.]
The Chief Justice, Gentle and Krishnaswami Aiyangar, JJ.
5th December, 1940.

Karuppa Goundan *v.* Minor Narashimman and others.
C.M.A. No. 501 of 1939 and C.M.S.A. No. 114 of 1940.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 28—*Rules framed under S.* 28—*Provision for right of appeal*—Ultra vires *the Government—Proceedings under S.* 19—*Whether proceedings in execution appealable under C P. Code, S.* 47.

An appeal does not lie as of right but must be conferred by express enactment. Rule 8 made under S. 28 of the Madras Agriculturists' Relief Act providing for appeals is *ultra vires.* Proceedings under S. 19 of the Act to scale down decrees are not proceedings in execution and no appeal will lie under S. 47, C.P.Code.

***K. Rajah Aiyar, V. Seshadri, P. J. Kuppanna Rao* and *V. C. Veeraraghavan* for Appellant.**

R. Kesava Aiyangar and *R. Ramamurthi Aiyar* for Respondents.

K S.

[F. B.]
The Chief Justice, Venkataramana Rao, Abdur Rahman, Krishnaswami Aiyangar and Horwill, JJ.
6th December, 1940.

Chinnasami Pillai *v.* Annamalai Chetty.
A.A A.O. No. 72 of 1938.

Limitation Act (*IX of* 1908), *Art* 182 (5)—*Transfer of decree to Court in Native State having reciprocal arrangement with British Indian Government—Whether 'step in aid of execution'.*

A money decree obtained in a British Indian Court was transferred on 25th January, 1932, for execution to the Chief Court, Pudukottah State, which had a reciprocal arrangement with the British Indian Government for executing decrees. The decree was retransferred after infructuous steps in the Native State to the British Indian Court on 29th September, 1936 and an execution petition was filed on 10th October, 1936.

Held (*Horwill, J., dissenting*), the application to transfer the decree to the Native State was a step in aid of execution. I.L.R. 40 Mad. 1069 (F.B.), overruled.

C. A. Seshagiri Sastriar for Appellant.
A. V. Viswanatha Sastri and *N. S. Srinivasan* for Respondent.
K.S.

[F. B.]

The Chief Justice, Gentle and Krishnaswami Aiyangar, JJ.
10th December, 1940.

Pechiappa Chettiar *v.* Vazhukka Chetty.
C.R.P. No. 880 of 1938.

Madras Agriculturists' Relief Act (IV of 1938), S. 15—Applicability to a tenant who had surrendered the holding before the commencement of the Act.

A suit was filed for recovery of the arrears of rent for the year 1935-1936. The tenancy had terminated by the surrender of the holding by the tenant in April, 1936. The defendant (tenant) contended that the arrears of rent had been wiped out by virtue of S. 15 of Madras Act IV of 1938.

Held, (*a*) that two conditions are necessary for the application of the section: (*i*) That the tenancy should be subsisting on the date of the commencement of the Act. (*ii*) That the rent for faslis 1846 and 1847 must be due from the tenant and that he should deposit the same on or before 30—8—1938.

(*b*) S. 15 of the said Act is not applicable to this case.

C. K. Viswanatha Aiyar for Petitioner.
C. V. Mahadeva Aiyar for Respondent.
K.S.

Wadsworth, J.
10th December, 1940

Kuppiah Chetty *v.* Saraswathi Ammal and others.
C.R.P. Nos. 1255 of 1937 and 540 of 1938.

Presidency Small Cause Courts Act (XV of 1882)—Two judges hearing a Full Bench application—Third judge also signing the judgment by mistake—Validity of judgment—Findings of fact—If can be interfered with by Full Bench.

When two judges heard the application and three judges signed the judgment but the third judge did not participate in the preparation of the judgment,

Held, that the judgment is not invalid.

Held, further, that the Full Bench of the Small Causes Court cannot interfere with findings of fact of the Trial Court and if it does so the High Court can interfere in revision. 40 Mad. 855 (F.B.), followed.

Case-law as to what would constitute a valid transfer of shares discussed. 50 Bom. 360 (P.C), followed.

K. S. Sankara Aiyar and *A. K. Sreeraman* for Petitioner.
K. Kuttikrishna Menon and *C. Vasudeva Mannadiar* for Respondents.
K.S.

King and Patanjali Sastri, JJ.
10th December, 1940.

Thillai Govinda Pillai *v.* Nicholas Rayar and another.
A.S. No. 127 of 1938.

Contract—Breach—Waiver.

The first respondent had entered into a contract with the second respondent to prepare the earth-work for part of a railway. One of the terms of the contract provided that the benefit or burden of the contract was not assignable. The contract also provided for its termination in the event of such assignment.

The first respondent entered into a partnership with the appellant and executed a power of attorney also in his favour, the result of which was that the appellant had to finance the contract and receive the monies from the railway company—the 2nd respondent. The power of attorney which

referred to the partnership agreement was deposited with the railway company who issued cheques to the appellant and never repudiated this contract with the 1st respondent.

After completion of works the appellant sued for the balance of money due from the 2nd respondent. The defence of the 2nd respondent was that the contract precluded recognition of any assignment.

Held, that the partnership and the power of attorney executed by the 1st respondent to the appellant amounted to an assignment of the benefits of the contract but that the 2nd respondent who had full knowledge, never exercised the option to repudiate and must be deemed to have waived his rights.

Quaere: Whether a term of a contract against assignment was valid and enforceable.

L.R. 3 Q.B.D. 569 and 12 Ves. 504, referred to.

K. V. Ramachandra Aiyar and *T. R. Ramabhadrachari* for Appellant.
A. Dorairaj for 1st Respondent.
King and *Partridge* for 2nd Respondent.

K.S.

Wadsworth, J.
11th December, 1940

Sreepathi Bellah *alias* Balagurumurthy and another *v.* Darsi Ramayya and another.

C.R.P. No. 1223 of 1940.

Civil Procedure Code (*V of* 1908), *Ss.* 148 *and* 151—*Application to set aside* ex parte *decree—Order setting aside—Conditional on payment of costs within one month and in default application to "stand dismissed with costs"—Power to grant extension for payment of costs—Inherent powers.*

The District Court passed an order allowing an appeal against the order of the District Munsiff refusing to set aside an *ex parte* decree on condition of the appellant paying the respondents Rs. 15 as costs within one month; in default the appeal was to "stand dismissed with costs". Within the one month's time appellant paid Rs. 12 to the respondents *bona fide* believing that the entry in the Court diary showing Rs. 12 as costs payable to the respondents was correct. Finding later that Rs. 15 and not Rs. 12 had been ordered to be paid the appellant applied long after the original order worked itself out to extend time. The District Court granted extension. In revision against the order of the District Court,

Held, (1) that the Court had no jurisdiction to extend time after the time granted originally expired in cases of orders which run as "stand dismissed with costs";

(2) that however the lower Court's order could be upheld on the theory of mistake of Court which should not prejudice a party. As the party was misled into paying Rs. 12 instead of Rs. 15 by reason of the wrong entry in the Court diary, time can be extended under the inherent powers of the Court.

Kasturi Seshagiri Rao for Petitioners.
W. Kothandaramayya for Respondents.

K.S.

[F.B.]

The Chief Justice, Venkataramana Rao, Abdur Rahman, Krishnaswami Ayyangar and Horwill, JJ.
17th December, 1940.

Venkateswara Sarma *v.* S. N. Venkatesa Iyer and others.

Appeals Nos. 26 and 27 of 1937.

Limitation Act (*IX of* 1908), *Arts.* 134-*B and* 144—*Alienation by manager of Hindu Religious Institution for valuable consideration—Interval bet-*

ween death of such manager and election or appointment of his successor —Limitation and adverse possession—Starting point.

A Matathipathi who had made alienations between 1876 to 1910 died on July 7, 1918, without nominating a successor. The disciples of the Mutt appointed the successor on June 6, 1922. The successor instituted a suit to set aside the alienations on April 12, 1934, claiming that his right to sue accrued on the date of his appointment,

Held (*Abdur Rahman and Krishnaswami Ayyangar, JJ., dissenting*), that Art. 134-B was directly applicable to the facts and even if Art. 144 should be applied, adverse possession of the alienees would have started from the date of the death of the alienating manager and the suit was barred by limitation.

Per *Abdur Rahman and Krishnaswami Ayyangar, JJ.*—The residuary Art. 144 applied to the facts and until there was a person capable of suing in existence there could be no question of adverse possession.

P. Govinda Menon for Appellant.

B. Sitarama Rao, A. V. Viswanatha Sastri, A. C. Sampath Aiyangar, N. C. Vijiaraghavachariar and *D. Ramaswami Aiyangar* for Respondents.

K.S.

Wadsworth, J.
18th December, 1940.

Narasareddi *v.* Thummuru Ranga Reddi.
C.R.P. No. 1894 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 8—Scope—Promissory note on 1—7—1933 in renewal of an earlier one—Payments and appropriations towards interest and principal of renewed note made before 1—10—1937—If can be re-opened.

A promissory note was executed on 1—7—1933 for Rs. 391-15-1 in renewal of an earlier promissory note for Rs. 255-15-0. The debtor had paid on 4—9—1934 Rs. 26-5-2 towards interest and Rs. 110-2-10 towards the principal of the renewed promissory note of 1—7—1933. In a suit on the promissory note filed on 4—9—1937 for the balance of principal and interest,

Held, that the appropriations made on 4—9—1934 cannot be undone and on that date the principal of the suit note was reduced to Rs. 281-12-3. (Rs. 255-15-0 principal originally advanced and Rs. 25-13-3 interest.) The principal of the renowed promissory note will be Rs. 255-15-0 and interest thereon outstanding on 1—10—1937 will be cancelled.

V. Subramaniam for Petitioner.

K. Kameswara Rao for Respondent.

K.S.

King and Patanjali Sastri, JJ.
20th December, 1940.

Subramania Iyer *v.* Ulagalum Perumal Sethurayar.
Appeal No. 243 of 1934.

Receiver in management during the pendency of succession suit relating to an impartible estate borrowing money on promissory note for paying peshkush—*Suit on pronote—Whether creditor can get decree against estate.*

Where a receiver in management of an impartible Zamindari during the pendency of a succession suit relating thereto borrowed money on a promissory note for paying *peshkush* due to Government in respect of the estate and in a suit on the note, the creditor sought to obtain a decree not merely against the maker but also against the estate,

Held: (1) A decree can be given against the estate only to the extent of any indemnity which the receiver may have against it,—no charge having been created in favour of the creditor at the time of the borrowing.

(2) The principle of the Full Bench decision in 42 Mad. 185 by which the estate of a minor could be bound by a debt incurred by his guardian could not be extended to the case of a debt incurred by a receiver.

(3) The estate cannot be bound on the principle of justice and equity that one who has enjoyed a benefit should also be bound by the obligation created by the arrangement under which such benefit was derived.

30 Cal. 397, dissented from.

(4) The creditor will not be entitled to be subrogated to the first charge available to Government in respect of *peshkush*.

A.I.R. 1936 Mad. 752, explained.

T. M. Krishnaswami Aiyar and *P. N. Appuswami Aiyar* for Appellant.

S. Venkataraman, *A. Swaminatha Aiyar* and *N. Rajagopala Aiyangar* for Respondents.

K.S.

[F.B.]

The Chief Justice, King, Somayya, Patanjali Sastri and Happell, JJ. 20*th December*, 1940.

Sivagurunatha Pillai *v.* Padmavathi Ammal. S.A. No. 1093 of 1937.

Negotiable Instruments Act (XXVI of 1881), *S.* 27—*Scope—Exclusion of personal liability—Surrounding circumstances—Whether can be looked into in construing a promissory note—Evidence* de hors *the instrument—Admissibility.*

A promissory note was executed in favour of *X* by one *S*, son of *V*, the husband and agent under power of attorney of *P* reciting that it was 'in respect of the debt due by *Sh*, my wife's junior paternal uncle'. *X* instituted a suit on the note both against the maker *S* and his wife *P*. The claim against *P* was on the footing that *S* executed the note in his capacity as a power of attorney agent of his wife, with due authority to execute the suit note. The first Court gave a decree against *P* and dismissed the suit against *S*. On appeal by the plaintiff, the District Judge dismissed the suit against *P* and granted a decree against *S* following 38 Mad. 482=25 M.L.J. 425. On Second Appeal,

Held, that both under the English law and the Indian law, the liability under a promissory note must arise upon the language of the note itself and without resorting to surrounding circumstances or other evidence *de hors* the instrument.

(1816) 5 M. & S. 345=105 E.R. 1077 and (1858) 3 H. & N. 177=157 E.R. 434, followed.

(1925) 2 K.B. 301, explained.

58 Mad. 735=68 M.L.J. 540, dissented from.

S. 27 of the Negotiable Instruments Act is differently worded from S. 26 of the Bills of Exchange Act in that under the Indian Act the exclusion of the liability of the agent can be inferred from the whole of the pronote, while under the English Act, the agent must exclude his liability only by suitable additions to his signature on the note.

38 Mad. 482=25 M.L.J. 425, dissented from.

The words occurring in the note that the maker was the power agent of his wife were not merely descriptive but sufficiently apt to connote that the maker was executing it only in his capacity as agent. In construing promissory notes written in vernacular, regard must be had to the habit of people executing them and their customary mode of expression.

Judgment of Sundarayyar, J., in 23 M.L.J. 417, approved.

K. Rajah Iyer and *S. Ramachandra Ayyar* for Appellant.

T. S. Venkatesa Iyer, *G. R. Jagadisan* and *N. C. Vijayaraghavachariar* for Respondent.

K.S.

Wadsworth, J.
4th December, 1940.

Srinivasa Rao *v.* Seshu Reddi and another.
C.R.Ps. Nos. 1103 and 1104 of 1938.

Civil Procedure Code (V of 1908), *O.* 21, *rr.* 85 *and* 86—*Failure by auction-purchaser to pay cost of general stamp for the sale certificate in time—Effect.*

Where an auction-purchaser paid the sale price on the date of the sale but by oversight omitted to pay also the cost of the general stamp for the sale certificate within 15 days as required by the amended r. 85 of O. 21, Civil Procedure Code,

Held, that there is no power to excuse the delay and the consequences set out in r. 86 must ensue.

43 M.L.J. 477, relied.

K. Kuppuswami for Petitioner.

Respondent not represented.

K.S.

Wadsworth, J.
4th December, 1940.

Appukutta Menon *v.* Narayanan Nambudripad.
C.R.P. No. 2551 of 1939

Madras Agriculturists' Relief Act (IV of 1938), *S.* 15 (4) *and Malabar Tenancy Act, S.* 8 (*b*)—*Application by tenant—Forum.*

Reading the explanation to S. 15 (4) of Act IV of 1938 along with S. 8 (*b*) of the Malabar Tenancy Act, a tenant applying for the benefits of S. 15 (4) must go to the same Court as the landlord suing for possession against his tenant. Where the landlord who would clearly have no claim possession by redeeming a kanom would have to go to the Court of the Subordinate Judge, the tenant applying for the benefits under S. 15 (4) of Act IV must also go to the Court of the Subordinate Judge.

K. Kuttikrishna Menon for Petitioner.

P. G. Krishna Aiyar for Respondent

K S.

Wadsworth, J.
13th December, 1940.

Kamalathammal *v.* The Official Receiver, West Tanjore.
C.R.P. No. 956 of 1939.

Insolvency—Settlement by insolvent prior to adjudication on his wife—Addition of minor son with himself as guardian—If changes the character of the transfer—Liability to be set aside.

Where a joint family manager before his adjudication settled the family properties on his wife that settlement would have to be made by him as manager and would get no additional validity by the mere addition of the minor son's name with his father as guardian. Such a transfer is in essence a transfer by the insolvent and is liable to be set aside in its entirety.

Decision of Pandrang Row, J., (1937) 2 M.L.J 427, followed.

Decision of Sundaram Chetty, J., A I.R. 1935 Mad. 246, not followed.

K. S. Desikan for Petitioner.

R. Rajagopala Iyengar for Respondent.

K.S.

Wadsworth, J
16th December, 1940

Unneeri Nair and another *v.* Krishna Aiyar.
C.R.P. No. 1519 of 1938.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 19—*Decree passed on* 25—3—1938—*S.* 19 *of Act IV not applicable.*

N.R.C.

Where a decree was passed on 25—3—1938, that is, three days after Act IV of 1938 came into force an application under S. 19 is not open to the judgment-debtor.

P. Govinda Menon for Petitioners.

N. R. Sesha Aiyar for Respondent.

K. S.

Wadsworth, J.
18th December, 1940.

Raman Chettiar *v.* Perumal Udayar.
C.R.P. No. 1707 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 9 *and* 19—*Plaint for balance of principal and interest on renewed pro-note after appropriation—Re-opening not permissible.*

The respondent on 26—6—1932 executed a promissory note for Rs. 668 in renewal of two earlier notes, the principal of which totalled Rs. 350. On 26—6—1934, Rs. 111-8-0 was paid for interest and Rs. 323 was paid for principal leaving a balance of Rs. 140 due. On 15—12—1934, Rs. 8 was paid for interest and Rs. 40 for principal leaving a balance of Rs. 100. A suit was filed in December, 1937 for Rs 100 and subsequent interest and a decree was given on 4th March, 1938. On an application to scale down the decree,

Held, the parties actually intended to appropriate these payments towards the real principal of the suit promissory note, which comprised both principal and interest of the earlier notes. The debtor cannot prove that there was an appropriation to the principal only of the earlier notes or that any interest was left outstanding on those notes to be cancelled as on 1—10—1937. The creditor is entitled to a decree for Rs. 100 with interest at 6 1/4 per cent. per annum from 1—10—1937 up to the date of the decree and subsequent interest at 6 per cent and costs and interest thereon at 5 per cent. up to 22—3—1938 and thereafter at 6 per cent. per annum.

M. S. Vaidyanatha Aiyar for Petitioner.

T. V. Ramanatha Aiyar, for Respondent.

K.S.

Mockett and Krishnaswami Iyengar, JJ.
20th December, 1940.

Easwarappa Goundar and others *v.* Hanumantharaya Goundan.
C.M.P. No. 5059 of 1939 in A.S. No. 169 of 1936.

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 8 *and* 9—*Decree for mesne profits for* 3 *years prior to suit by Court of Appeal in* 1939 *on suit of* 1922—*Liability to scaling down as "debt".*

A suit for partition instituted in 1922, was dismissed by the Trial Court but the High Court on appeal decreed it in 1933 and held that the plaintiff was entitled to mesne profits for three years prior to suit. The lower Court ascertained the mesne profits in 1935 and that was substantially affirmed by the High Court on 1—3—1939. On an application to scale down the debt as decreed under Ss. 8 and 9 of Act IV of 1938,

Held, though the extent of the defendant's liability was actually ascertained only in 1935, still, the liability was there and hence it was a debt within the meaning of the Act and was liable to be scaled down in accordance with the provisions of the Act.

I.L.R. 1939 Mad. 776, referred to.

K. Bhashyam Iyengar and *T. R. Srinivasan* for Petitioners.

Ch. Raghava Rao and *D. R. Krishna Rao* for Respondent.

K.S.

Wadsworth, J. Subbaramayya *v.* Pedda Subbiah.
10*th December*, 1940. C.R.P. No. 1551 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 3 (ii), *Proviso* C *Explanation—Assessment on basis of capital value—Calculation of rental value—Proper procedure.*

Where the assessment on properties is on the basis of capital value, under the explanation to S. 3 (*ii*), Proviso *C* of Madras Act IV of 1938, the rental value must be calculated at 5 per cent. of the capital value. It is not open to the Court to take evidence of the actual rent paid, capitalise this on the 5 per cent. basis and hold that the capital value on which the assessment was based was not the actual figure adopted but the fictitious figure thus calculated.

K. S. Jayaram for Petitioner.

E. Venkataramana Rao for Respondent.

K.S.

Krishnaswami Ayyangar, J. Mohammed Khan *v.* John Major.
18*th December*, 1940. C.R.P. No. 1431 of 1938.

Provincial Small Cause Courts Act (*IX of* 1887), *S.* 17—*Oral evidence not given on oath—Judgment based on—Validity—Proper procedure.*

There is no warrant in law for a judgment in a small cause suit being based upon an oral examination of the parties whose evidence was not given on oath before the Court. S. 17 of the Provincial Small Cause Courts Act makes the provisions of the Civil Procedure Code, applicable to Small Cause Courts save in so far as it might otherwise be provided. O. 18, r. 13 of C. P. Code, contains a provision to the effect that in cases in which an appeal is not allowed—small cause suits are such cases—it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record. This procedure should be followed and an oral examination which is not permitted by law should not be resorted to.

A. Gopalacharlu for Petitioner.

K.S.

Wadsworth, J. *In re*, Veera Reddi and others (Accused).
18*th December*, 1940. C.R.P. No. 1939 of 1940.

Criminal Procedure Code (*V of* 1898), *Ss.* 195 *and* 476—*Scope.*

One of the offences alleged was an offence under S. 193, I. P. Code, in connection with a proceeding before the District Munsif and such an offence falls under S. 195 (1) (*b*), Cr. P. Code, for which a complaint under S. 476, Cr. P. Code, is necessary. But the fact that the District Munsif had also complained that the facts established offences under other sections of the I. P. Code, to which S. 476, had no application is not a ground for cancelling the complaint which was valid and necessary so far as the offences under S. 193, I. P. Code, was concerned.

A. Narasimha Aiyar for Petitioner.

The Public Prosecutor for the Crown.

K.S.

The Chief Justice and Happell, J. Malla Reddi *v* Karuppa.
19*th December*, 1940. C.M.P. No. 5467 of 1940.

Madras Debt Conciliation Act (*XI of* 1936), *S.* 10—*Scope.*

On 2—6—1939 respondents (debtors) filed a petition for the settlement of their debts disclosing a debt of Rs. 1,500 due on a mortgage in favour of the petitioner and a debt of Rs. 130 due to another on a promissory note. The Board issued a notice under S. 10 (1) of the Act to the petitioner on 31—8—1939. On 11—1—1940 the petitioner filed extracts of his accounts as 'proof of debts and accounts' in compliance with the notice. One of the respondents wanted time to scrutinise the accounts and was allowed time till the 20th January, 1940. After many adjourn-

ments granted at the request of the respondent the petition was taken up on 11—5—1940 when neither the petitioner nor his advocate could be present. Thereupon the Board proceeded to declare the debt discharged under S. 10 (2) of the Act notwithstanding that the respondent had admitted that there was Rs. 1,500 due to the petitioner. In an application for a writ to quash the proceedings,

Held, that the Board had no right in these circumstances to invoke S. 10 (2) of the Act; it could only act under S. 12 if at all. But it could not say that there was no amount due to the petitioner in the face of the admission The Board should exercise the powers under S. 17 of the Act if no amicable settlement is arrived at within twelve months from the date of the application.

C. Sambasiva Rao and *C. Siva Rao* for Petitioner.

K. Srinivasa Rao for Respondents.

K S.

King and Patanjali Sastri, JJ.
19th December, 1940.

Marina Ammayi *v.* Mirza Bather. Beg Sahib.

C.R.P. No. 1330 and 1331 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 8 *and* 19—*Preliminary decree for redemption in suit by agriculturist mortgagor impleading non-agriculturist purchasers of portions of hypotheca as co-plaintiffs—Scaling down decree—Discharge of decree against mortgagor by reason of* damdupat *rule—Effect on liability of non-agriculturist co-plaintiffs.*

In a suit by the mortgagors who were agriculturists, to redeem the mortgage, impleading the purchasers of portions of the hypotheca as co-plaintiffs, redemption was decreed on payment of a certain sum. When the agriculturist mortgagors got the decree scaled down more than twice the principal amount having been paid the decree stood discharged. In the circumstances,

Held, that satisfaction can be entered for the decree as a whole and the liability of the non-agriculturist co-plaintiffs is also discharged.

(1940) 2 M.L.J. 872, approved and distinguished.

G. Chandrasekara Sastri for Petitioners.

T. Satyanarayana for Respondent in C.R.P. No. 1330 of 1939.

V. Govindarajachari for Respondent in C R.P. No. 1331 of 1939.

K.S.

Lakshmana Rao, J
10th January, 1941.

Ahmed Mohideen *v.* Yusuf Ali Syed.

Cr.R.C. No 733 of 1940 and Cr. R. P. No. 692 of 1940.

Code of Criminal Procedure (V of 1898), *S.* 197—*Charge that complainant was beaten by Sub-Inspectors under the instructions of respondent (Assistant Commissioner of Police)—Previous sanction of the Governor of the Province—Necessity.*

Two Sub-Inspectors were alleged to have beaten the complainant in the police station (where he was taken after arrest) under the orders of the Assistant Commissioner In a complaint against the Assistant Commissioner,

Held, that the Assistant Commissioner gave the order if any while acting or purporting to act in the discharge of his official duty. He is not removable from his office save by or with the sanction of the Secretary of State and S. 197 enacts that no Court can take cognizance of such offence except with the previous sanction of the Governor of the Province in the exercise of his individual judgment.

V. T Rangaswami Aiyangar and *K. Ramaswami Aiyangar* for Petitioner.

V. L. Ethiraj for *A. S Sivakamanathan* for Respondent.

Crown Prosecutor (P. Govinda Menon) for the Crown.

K.S.

Wadsworth, J. Saraswathi Ammal *v.* Arabusa Sahib.
11*th December*, 1940. C.R.P. No. 1704 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 8 (1), 19 *and* 20 —*Dismissal of stay application under S.* 20 *for default—Effect on right to apply for scaling down decree under S.* 19—*Amounts realised in execution after* 1*st October*, 1937—*Appropriation by creditor—Permissibility.*

Section 20 of Act IV of 1938 does not contemplate any final decision on the question of the right of the applicant to apply under S. 19. Moreover, when the applicant allows his application under S. 20 to be dismissed for default he is clearly abandoning only his right to a stay. That abandonment may be due to many causes. For instance, the execution may have stopped for some reasons quite apart from the proceedings under the Act. In such a case there is no point in the applicant going on with his proceedings under S. 20 if time is available to him without such proceedings for preferring his application to the Court which passed the decree under S. 19. Accordingly when an agriculturist allows his application under S. 20 to be dismissed because it is not necessary, such a dismissal would not bar the substantive application under S. 19. The period of limitation prescribed in S. 20 begins to run with the grant of a stay and not when there was no grant of stay.

I.L.R. (1939), Mad. 886, referred to and explained.

Held also, that an amount realised in execution of a decree after 1st October, 1937, could not be appropriated by the decree-holder to interest accruing due before 1st October, 1937, so as to nullify the effect of S. 8 (1) of the Act.

(1940) 2 M.L.J. 547, followed.

N. Sivaramakrishna Aiyar for Petitioner.

R. Ramamurthi Aiyar for Respondent.

K.S.

The Chief Justice and Happell, J. Rajah Venkata Ramayya Appa Rao Bahadur *v.* Secretary of State for India in Council.
12*th December*, 1940. L.P.A. No. 21 of 1939.

Madras Local Boards Act (XIV of 1920), *Ss.* 74-*B*, 78 *and* 79 (*iii*)—*Owner of tank bed—Liability for land cess based on annual rental value of the fishery.*

Where a person is the owner of the bed of a tank the right to the fish in the tank is his. Therefore there is no escaping the conclusion that such an owner is in beneficial occupation of the land forming the bed of his tank and the levy of land cess on the value of the land, which is to be gauged by the value of the right to fish in the water lying above the land, is lawful.

(1939) A.C. 197, relied on.

Decision of *Wadsworth, J.*, in (1939) 1 M.L.J. 780, affirmed.

Y. Govindarajulu for Appellant.

The Government Pleader (*B. Sitarama Rao*) for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. Arumugam Pillai *v.* Sadasivam Pillai.
18*th December*, 1940. C.R.P. No. 1655 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 19—*Final decree on mortgage against non-agriculturist mortgagor and agriculturist purchaser of part of the hypotheca—Scaling down—Principles.*

X the purchaser of part of the hypotheca was impleaded as a defendant in a mortgage suit which resulted in a final decree. The mortgagor was a non-agriculturist but *X* was an agriculturist. In an application by *X* for scaling down,

Held, that X the purchaser was a debtor for the purpose of Madras Act IV of 1938, and can apply under S. 19 to scale down the decree notwithstanding the fact that the mortgagor was a non-agriculturist.

The decree can be amended so as to leave it unaffected so far as the liability of the non-agriculturist debtor is concerned.

(1940) 2 M.L.J. 872, relied on.

N. R. Sesha Aiyar for Petitioner.

K. S. Venkatarama Aiyar for Respondent.

K.S.

Wadsworth, J.
16*th December*, 1940.

Chithambara Aiyar *v.* Srinivasa Aiyar.
C.R.P. No. 2313 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 4 (*f*)—*Subscriber to chit fund executing security bond or mortgage to guarantee discharge of his obligation—Default—If breach of trust—S.* 4 (*f*), *if applicable.*

The liability of the subscriber who bids at a chit auction and takes the pool at a discount executing a security bond or mortgage to guarantee the discharge of his obligation by the payment of his future instalments, is a liability to which Act IV of 1938 applies. There is no question of breach of trust if he commits default and S. 4 (*f*) of the Act has no application.

C. K. Viswanatha Aiyar for Petitioner.

C. S. Swaminathan for Respondent.

K.S.

Krishnaswami Ayyangar, J.
18*th December*, 1940.

S. A. Ramanathan Chettiar *v.* The Official Receiver of West Tanjore.
A.A.A.O. No. 1 of 1939.

Provincial Insolvency Act (*V of* 1920), *S.* 28 (7) *and S.* 2 (d)—*Sale by debtor including his son's share after filing of creditor's petition for adjudication as insolvent—Debtor adjudged insolvent—Rights of Official Receiver to the property—"Relation back"—S.* 2 (d) *'Property' includes a Hindu father's right to sell his son's share.*

A sale deed was executed on 16th December, 1931, by the debtor including the shares of his sons, when a creditor's petition presented in November, 1929, for his adjudication was pending. In a claim by the Official Receiver to the properties on the adjudication of the creditor as insolvent on 11th April, 1932,

Held, that as under S. 28 (7) of the Provincial Insolvency Act, the title of the Official Receiver, related back to the date of the presentation of the petition, on the date of the sale not only the interest of the insolvent in the property but his right to sell the interests of his sons had vested in the receiver and therefore nothing passed to the purchaser under the sale. 'Property'' in S. 2 (*d*) includes a Hindu father's right to sell his son's shares.

A purchaser of the share of some members of a joint family has no right to possession along with the other members whose interests still remain in them. The purchaser's rights in such cases have to be worked out by a separate suit for partition.

A Swaminatha Iyer and *S. Thyagaraja Iyer* for Appellant.

S. Muthiah Mudaliar for Respondent.

K.S.

The Chief Justice and Happell, J.
19*th December*, 1940.

Ramabhadran *v.* Manickkam.
O.S.A. No. 89 of 1940.

Companies Act (*VII of* 1913), *Ss.* 156 *and* 158—*Voluntary liquidation—Liquidator settling list of contributories—Power to make calls—Enforcing compliance with the calls—Procedure.*

In a voluntary liquidation the liquidator settled the list of contributories and when some of them did not comply with 'calls' made upon them applied

to the High Court for an order under S. 216 of the Companies Act. Under S. 212 the liquidator has power to settle the list of contributories and where persons were rightly placed on the list of contributories, the liquidator is entitled to make calls upon them and the amounts become payable irrespective of any question of limitation.

Where the contesting contributories raise several defences, the proper procedure is to direct the liquidator to file suits and not to pass an order under S. 216 of the Companies Act.

S. Parthasarathi and *V. K. Tiruvenkatachari* for Appellant.

V. Ramaswami Aiyar, S. Nagaraja Aiyar, A. K. Sriraman and N. G. Krishna Aiyangar for Respondents.

K.S.

Wadsworth, J. Subba Reddi *v.* Venkatappa Reddi.

19th December, 1940.

C.R.P. No. 1956 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 4 (h)—*Promissory note standing in favour of men—Evidence to show that debt is really owed to a woman to invoke S.* 4 (h)—*Not permissible.*

A decree was obtained by the holder of a promissory note which at least since 1935 stood in the name of men.

Held, that in such circumstances it is not permissible for the decree-holder to adduce evidence that the debt is really owed to a woman in order to invoke S. 4 (*h*) of Act IV of 1938. The liability of the judgment-debtor is to the decree-holder and to no one else, though the decree-holder may himself be liable to pay the realisation to a woman.

P Chandra Reddi and *R. Ramalinga Reddi* for Petitioner.

Kasturi Seshagiri Rao for Respondent.

K.S.

Krishnaswami Ayyangar, J. Venkatasubbiah Chowdari *v.* Venkatasubbiah and others.

19th December, 1940.

A.A.A.O. Nos. 101 and 102 of 1939.

Execution—Decree against A, *the manager of a joint family personally and his brother* B *to the extent of the assets of joint family—Adjudication of* B *as insolvent pending execution proceedings against him—Subsequent application to proceed against his sons shares after twelve years from decree —If barred by S.* 48, *C. P. Code—Orders in execution proceedings against* B—*How far binding on* B's *sons.*

A decree was passed on 30—11—1918 against the maker of a promissory note *A* who was the manager of a joint family and his brother *B*. Against *A* the decree was personal and it directed that the decretal amount should also be recoverable from the assets of the joint family of *A* and *B*. A number of execution applications were taken out by the decree-holder before 1930, all of which ended in nothing being recovered. On 29th November, 1930, the last day of the period of twelve years limited by S. 48, C. P. Code, the decree-holder filed an execution petition for the attachment of some specified immovable properties of the joint family. When the petition was pending *A* was on his own petition adjudged an insolvent on 18—7—1932 and on 26—9—1932 the execution petition was dismissed. On 1st November, 1933, the order of adjudication was annulled and on 28—4—1934 a fresh execution petition was filed by a person who had meanwhile obtained an assignment of the decree. Pending this execution petition *B* was adjudicated an insolvent on his own petition, and the assignee decree-holder obtained permission of the Insolvency Court to proceed against the shares of the sons of *B*, the insolvent The assignee

decree-holder thereupon filed an application for the sale of the interest of the sons.

Held, that *B* effectively represented his sons in the prior execution proceeding of 10—9—1934 and the decisions thereon were binding upon the sons and as the proceeding was merely a continuation of the execution proceedings in 1930, there is no question of S. 48, C.P.Code being attracted.

Y. Suryanarayana for Appellant.

K. Krishnamurthi for Respondent.

K.S.

The Chief Justice and Happell, J
20th December, 1940.

Doraiswami Naicken *v.* Periakaruppan Chettiar.
L.P.A. No. 10 of 1940.

Limitation Act (*IX of* 1908), *S.* 20 (2)—*Applicability—Mortgagee going into possession under an invalid contract of sale after preliminary decree—Receipt of rents and profits while in possession—If saves limitation for application for a final decree.*

The plaintiff who had a valid mortgage went into possession of the mortgaged properties under an invalid contract of sale.

Held, that the fact that his sale proved to be invalid could not vitiate his title as mortgagee and the rents and profits which he received must in the circumstances be deemed to have been received by him as mortgagee. And such receipt of rents by the mortgagee while in possession extends the time for the filing of an application for a final decree.

Case-law discussed.

Decision of *Patanjali Sastri, J.*, in (1940) 1 M.L.J. 134, reversed.

K. Rajah Aiyar for Appellant.

S. Ramachandra Aiyar for Respondent.

K.S.

Mockett and Wadsworth, JJ.
10*th January*, 1941.

Ramasubba Iyer *v* Ayyalu Naidu.
C.R.P. No. 1820 of 1940.

Court-Fees Act (*VII of* 1870), *S.* 7, *Cl.* (*iv*) (*a*)—*Suit by worshippers for a declaration that a decree obtained against the temple was invalid and not binding—Suit valuation and court-fee payable*

A grocer obtained a decree against a temple and it was alleged that it was in collusion with the trustee. Three worshippers filed a suit praying *inter alia* for a declaration that the earlier decree was not binding on the temple. On the question of the proper court-fee payable in respect of the relief,

Held, per *Mockett, J.*, the suit is different from reversionary suits such as the one in 45 L.W. 380 where a reversioner asks that a decree against the widow should be declared invalid. Where persons come forward and virtually say that, as representing a particular entity (and a temple is an example of an entity that must be represented) they claim to have a decree against it cancelled, court-fee should be paid under S. 7, Cl. (*iv*) (*a*) of the Court-Fees Act.

Per *Wadsworth, J.*—The plaintiffs really sue only in the right of the temple and its trustees and they should not be permitted to escape from the natural consequences of their suit by arraying the temple and its trustees amongst the defendants instead of their being co-plaintiffs as in theory they ought to have been.

V. N. Venkatavaradachariar for Petitioner.

The Government Pleader (B. Sitarama Rao), K. S. Desikan and *S. Sankara Aiyar* for Respondent.

K. S.

Lakshmana Rao, J.
17th January, 1941.

Sharma *v.* Dharma Rao.
Cr.R.C. No 856 of 1940 and Cr.R.P. No. 809 of 1940.

Copyright Act (III of 1914), Ss 7 and 8—Complaint disclosing an offence under—Dismissal on the ground that dispute is of civil nature—Propriety.

Where the complaint discloses an offence under Ss. 7 and 8 of the Indian Copyright Act its dismissal on the ground that the dispute is of a civil nature cannot be sustained

T. R. Venkataraman for Petitioner

P. Srinivasa Aiyangar for Respondent.

Crown Prosecutor for the Crown

K.S.

King, J.
17th January, 1941

Middle School, Sathur *v* Meenakshisundaram Aiyar.
C.R.P. No. 1688 of 1938

Master and servant—Dismissal of a teacher without notice—Madras Educational Rules, R. 154—Three months' notice—Necessity for

A teacher was dismissed from service by the management of an aided school, without any notice, for alleged misconduct which was not, however, enquired into by the Director of Public Instruction. In a suit by the teacher claiming three months' salary in lieu of notice,

Held, that under the Madras Educational Rules a teacher is entitled to three months' notice or to payment of three months' salary in lieu of notice; and even if there is no written contract between the teacher and the management, the teacher is entitled to such notice unless he is guilty of such misconduct as may be considered by the Director of Public Instruction to warrant cancellation or suspension of his certificate under r. 154; and the Director of Public Instruction alone is the ultimate authority on the question of misconduct.

S. Narayana Aiyangar for Petitioner.

R. Desikan, for Respondent

K S

King and Patanjali Sastri, JJ.
23rd January, 1941.

Arunachalam Pillai *v.* Sithurama Naidu
A S No. 47 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Mortgage debt scaled down in favour of agriculturist mortgagor—Effect on liability of the property in the hands of non-agriculturist court-auction-purchaser in execution of a money decree against mortgagor—Relinquishment by mortgagee of right to personal decree against mortgagor—Effect on liability of the purchaser.

In a suit to enforce a mortgage against the agriculturist mortgagor and a non-agriculturist court-auction-purchaser of the mortgaged property in execution of a money-decree, the debt was scaled down on the application of the mortgagor. Thereupon the mortgagee sought to recover the full amount due on the mortgage from the non-agriculturist purchaser offering to relinquish his right to a personal decree against the mortgagor

Held, the properties are liable only as security for the debt due by the mortgagor and if as a result of the Act there is a statutory discharge or reduction of the debt, the properties cannot be proceeded against for anything more than the scaled down amount of the debt. The purchaser in court-auction took the property subject to the burden of the mortgage and if the burden is by reason of the provisions of S. 8 of Act IV of 1938 reduced without payment, the purchase proves to that extent an advantageous one and there is nothing in the Act to deprive the purchaser of the fruits of his lucky purchase even though he is not an agriculturist. He gets the benefit of the scaling down not because the provisions of the Act apply to him, for obviously they do not, but because such benefit is a necessary incident of his purchase under the general law and the Act does not deprive him of it. The relinquishment by the mortgagee of this right to a personal decree against the mortgagor after Act IV of 1938 had come into force and the mortgagor had in fact applied for relief under it, cannot affect the position which arises under the Act with reference to a date long prior to such relinquishment. What the consequence would be if the mortgagee had agreed to exonerate the mortgagor from all personal liability before the Act came into force was left open.

(1940) 2 M.L.J. 872, distinguished. I.L.R. 1939 Mad. 218= (1938) 2 M L.J. 1068, referred to.

K. V. Sesha Aiyangar and *R. Subramania Aiyar* for Appellant.

T. M. Krishnaswami Aiyar and *K Venkateswaran* for Respondents.

K.S.

Lakshmana Rao, J.
23rd January, 1941.

Public Prosecutor *v.* Hall & Company, Coimbatore.

Crl. App. No. 697 of 1940.

Companies Act (*VII of* 1913), *S.* 282-B (5)—*Security deposit by employee of company not deposited in scheduled bank—Liability of managing agents and secretaries to conviction under S.* 282-B (5).

Where the security deposit of an employee of a company is not deposited in a scheduled bank by the employer company as required by S. 281-B (1) of the Companies Act the managing agents and secretaries of the company are guilty and liable to a conviction for an offence under S. 282-B (5) of the Indian Companies Act.

A. S. Sivakaminathan for Public Prosecutor.

Respondent not represented

K.S.

Happell, J
24th January, 1941.

Rangasami Nadar *v.* Minor Pichamani by guardian Chinnu Nadar.

C.R.P. No. 1511 of 1938.

Civil Procedure Code (*V of* 1908), *O.* 41, *r.* 10—*Appeal — Order directing security to be furnished within a specified time—Security tendered in time—Rejection of appeal before testing—Propriety.*

Where security is ordered to be furnished within a particular time, it is a compliance with the order if it is tendered within the time; and the appeal cannot be rejected unless the security is tested and found insufficient, even though the testing is after the time fixed for furnishing it. The testing of the security itself need not be within the time

Decision of *Jackson, J.*, in 52 M.L.J. (Short Notes) 53, relied on.

R. Desikan for Petitioner.

P N. Appuswami Aiyar for Respondent.

K.S.

Wadsworth, J. Subbiah Nadar v. Thangiah Nadar.
4th December, 1940. C.R.P. Nos. 979 and 980 of 1938.

Madras Agriculturists' Relief Act (IV of 1938), S. 23—"Within ninety days of the commencement of the Act"—Interpretation—Sale to be set aside as a whole.

The words 'within ninety days of the commencement of this Act' in S. 23 would ordinarily indicate 'within a period of ninety days after the date on which the Act commences'. The difference in the phraseology in S. 23 from that used in S. 20 is not sufficient to justify the Court in interpreting the above words as being intended to mean 'within 89 days after the commencement of the Act'.

The words "may apply to the Court within ninety days" lay down a period of limitation within which the application may be presented and in computing that period if the last date falls on a day when the Court is closed such day can be excluded. S. 23 is applicable even when the sale in execution has been followed by delivery.

(1940) 2 M.L.J. 709, relied on.

An application by one judgment-debtor can enure to the benefit of the other judgment-debtors also. The whole sale has to be set aside and proceedings under S. 19, will result in benefit to the several judgment-debtors according as they are agriculturists or not.

R. S. Srinivasacharya and *K. V. Rajagopalan* for Petitioner.

J. S. Vedamanikkam for Respondent.

K.S.

Wadsworth, J. Ponnusami Goundan v. Kanniappa Goundan.
11th December, 1940. C.R.P. No. 1746 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Application by non-agriculturist judgment-debtor—Competency—Agriculturist debtor's rights—If can be decided in the application.

There is no jurisdiction under S. 19 to amend a decree on an application by a judgment-debtor who is admittedly a non-agriculturist. Whether or not the non-agriculturist judgment-debtor would be entitled to the benefits of S. 14 of the Act, if and when the agriculturist judgment-debtors get the decree re-opened under S. 19, is a matter which cannot be decided in proceedings under Act, IV of 1938, started by a non-agriculturist judgment-debtor.

T. S. Vaithianatha Aiyar for Petitioner.

K. V. Srinivasa Aiyar for Respondent.

K.S.

Venkataramana Rao and Horwill, JJ. Venkatasabapathy Chetty v.
7th January, 1941. Unnamalai Ammal.
A.A.O. No. 217 of 1938.

Practice—Costs—Beneficiary propounding will and applying for probate—Contest by widow—Putting plaintiff to proof—Costs of beneficiary proving the will—Right to—Practice—Duty of Probate Court to grant letters of administration with the will annexed to proper person, where no executor is appointed under will.

Where a beneficiary applies for probate of a will and on the application being contested he was put to proof of the will,

Held, that the usual practice in cases where a plaintiff seeks to establish a will under which he has been given a legacy and the plaintiff is merely put to proof of it, is to award costs to both parties from and out of the estate.

In cases where no executor has been appointed under the will it is the duty of the Probate Court on the will being established to direct the issue of

letters of administration with will annexed to such persons as are under the Succession Act competent to administer the estate thus avoiding further expenses and litigation.

T. K. Sundararaman for Appellant.

Ch. Raghava Rao for Respondent.

K.S.

Venkataramana Rao and Horwill, JJ. *10th January, 1941.* — Mallayyamma *v.* Province of Madras represented by the Collector of Vizagapatam. A.A.O. No. 288 of 1939.

*Civil Procedure Code (V of 1908), O. 33, r. 10—Abatement of suit by death of pauper plaintiff—Absence of provision for payment of Court-fees and costs of Government from estate of deceased plaintiff—*Lacuna *pointed out.*

Where the suit abates by reason of the death of a pauper plaintiff, on the question as to the liability to pay the Court-fees due to the Government O. 33, rr. 10 and 11 do not directly cover the case and there is a *lacuna*. It is desirable for the legislature to take steps to amend the Civil Procedure Code, to cure such *lacuna*.

P. Somasundaram for Appellant.

The Government Pleader for Government.

K.S.

Burn, O.C.J. and Happell, J. *15th January, 1941.* — Periyathayammal *v.* Cunniah Naidu. Crl.M.P. No. 1496 of 1940.

Contempt of Court—Suit for ejectment of sole defendant and for delivery of possession—Receiver appointed while suit was pending, at the instance of plaintiffs for the purpose of harvesting the crops on the land and for realising the rents and profits of the land in suit—Stranger claiming that he was entitled to and was in possession—Order of Court confirming receiver's possession—Stranger circulating notice to public asserting his right and warning public from taking lease—Contempt.

Plaintiffs filed a suit for the ejectment of a sole defendant and for delivery of possession of some property. While the suit was pending, the plaintiffs applied for the appointment of a Receiver for the purpose of harvesting the crops on the land and for realising the rents and profits due from the tenants who were cultivating the land. The receiver took possession with police help. Subsequently an application was put in by the plaintiffs for an order directing the receiver to lease out the plaint land in order to prevent loss to them. *X* a third party also filed another application in which he claimed that the plaintiffs in the suit were not entitled to oust them from the property for the reason that *X* was both entitled to and in possession of it.* The District Judge passed an order saying that he saw no justification for disturbing the possession of the receiver since *X* came to the Court very late and the receiver had done most of the work entrusted to him. He consequently directed the receiver to sell the produce in the open market. It was alleged that *X* was orally asserting that the property belonged to him and he would not allow the crop growing on the land to be removed and also issued a notice informing the public that they should not purchase the properties described in it or the produce standing on them or take them on lease in contravention of the rights of *X* and warning the public that if they purchased the property in auction or entered up on it without *X's* permission they would themselves be responsible for any trouble that resulted. In an application to commit *X* for contempt of Court,

Held, that *X* was guilty of contempt of Court in circulating the notice. (In view however of the mitigating circumstances the apology tendered by *X* was accepted and *X* was discharged but directed to pay the petitioners' costs.)

K. Rajah Aiyar and *R. Rangachari* for Petitioners.

Ch. Raghava Rao for Respondents.

K.S.

Pandrang Row and Somayya, JJ. *29th January*, 1941.

M. & S. M. Railway Co. *v.* Municipal Council, Bezwada.
A.S. Nos. 240 and 297 of 1937.

Madras District Municipalities Act (V of 1920), Ss. 81 and 354—Vacant lands and buildings in possession of railway company—Assessment of property-tax—Committee formed to fix capital value—Validity—Annual value—Computation based on capital value.

In pursuance of a notification issued by the Government of India under S. 135 of the Indian Railways Act, authorising Municipalities to levy property-tax on railway lands and buildings in accordance with S. 81 of the District Municipalities Act, the Municipal Council of Bezwada sought to levy property-tax on the appellant railway company. At the instance of the company a committee was constituted to fix the capital value of the lands and buildings and on the basis of the value so fixed the chairman of the municipality levied and collected a lakh of rupees as tax for the quinquennium from the railway company. In a suit questioning the legality of the procedure and the assessment,

Held, that (*i*) the railway company had to show that there was no substantial compliance with the District Municipalities Act; (*ii*) when there was no basis for fixing the annual value of vacant lands, it was permissible on the analogy of English decisions interpreting rating statutes, (*e.g.*) to adopt the capital value basis for determining the annual value; (*iii*) though there was no statutory provision for a committee to fix the annual value, the company itself having asked for it, the levy of the tax by the chairman adopting the opinion of the committee was not illegal; and (*iv*) there was substantial compliance with the provisions of the Act in levying the tax.

T. R. Venkatarama Sastri instructed by *Messrs. King and Partridge*, solicitors for Appellant.

Sir Alladi Krishnaswami Aiyar and *P. Satyanarayana Rao* for Respondent.

K.S.

Mockett, J. *30th January*, 1941.

Velayudham Pillai *v.* Subramania Pillai.
C.R.P. No. 1696 of 1940.

Civil Procedure Code (V of 1908), O. 11, r. 14—Certified copies of income-tax returns—Whether a party can be compelled to obtain and produce at the instance of the opposite party—Income-tax Act, S. 54—Scope and effect.

A plaintiff applied to the Court under O. 11, r. 14, Civil Procedure Code for an order directing the defendant to obtain certified copies of the income-tax returns of the defendant and to produce them, alleging that they would be material to prove the plaintiff's case.

Held, that the defendant cannot be compelled to produce documents not yet in existence as they could not be said to be in his 'possession or power'.

Held, further, that such discretionary orders under O. 11, r. 14 could not be passed except under very special circumstances and that in view of S. 54 of the Income-tax Act, such documents must be treated as confiden-

tial and the Court should not compel the assessee to apply for copies and produce them.

K. S. Desikan and *K. Raman* for Petitioner.

S. Panchapakesa Sastri and *P. S. Ramachandran* for Respondent.

K.S.

King, J. Muni Reddi *v.* Muni Reddi.
31st January, 1941. **C.M.S.A. Nos. 116 and 118 of 1940.**

Madras Debt Conciliation Act (XI of 1936), S. 18—Creditors representing more than fifty per cent. of the debts accepting settlement—Two decree-holder-creditors not consenting—Registration of agreement with consenting creditors earmarking the debtor's assets to those debts and issue of certificate by the Board that a fair offer had been rejected by the two decree-holders—Effect on executability of the decrees.

A debtor applied for conciliation of his debts. There were ten creditors. Eight of them to whom more than fifty per cent. of the debts was due, agreed to a settlement. The remaining two creditors who had already obtained decrees refused to consent to the settlement. After due registration of the settlement the Board issued a certificate that a fair offer which was made had been rejected by the decree-holders. In an application for execution of the decrees it was contended that the certificate of the Board must be deemed to be a "decree of the Court" and that the assets set apart in the agreement cannot be proceeded against.

Held, that there was nothing in S. 18 about the position of creditors who have already obtained decrees and there was no obstacle to the execution of the decrees.

K. Bashyam Aiyangar and *T. R. Srinivasan* for Appellants.

B. C. Seshachala Aiyar, P. S. Ramachandran and *S. Venkatachalam* for Respondents.

K.S.

Venkataramana Rao, J. Nallathambi Paradesi *v.* Madras Hindu
3rd February, 1941. Religious Endowments Board and others.
C.R.P. No. 1472 of 1938.

*Madras Hindu Religious Endowments Act (II of 1927). S. 84 (2) Board deciding a temple to be 'excepted temple' on the application of trustee —Worshipper who was allowed to contest the application—*Locus standi *to apply under S. 84 (2) of the Endowments Act, to have the order set aside.*

A trustee of a temple applied to the Endowments Board to have the temple declared an excepted temple. A worshipper opposed the application. The Board declared the temple to be an excepted one. In an application by the worshipper to the District Court under S. 84 (2) of the Endowments Act, to set aside the order of the Board an objection was taken to the *locus standi* of the worshipper to apply, on the ground that he was not a "person aggrieved or affected" by the order.

Held, that the worshipper having been allowed to contest the application before the Board, he must be deemed to be a person affected by the decision which was adverse to him and he had therefore a right to apply under S. 84 (2) of the Act, to have the order of the Board set aside.

T. A. Ramaswami Reddi for Petitioner.

V. V. Chowdary, M. Seshachalapathi and *T. R. Srinivasan* for Respondents.

K.S.

Happell, J.
6th January, 1941.

Raja Venkatanarasimha *v.* Polina Rattamma.
C.R.P. No. 1543 of 1938.

Madras Estates Land Act (I of 1908), S. 3 (10)—Accretion to village in a lanka in a river leased out to tenants—Whether jirayati or private land—Suit for rent—Forum.

Land which is an accretion to a village situated in a lanka in a river and leased out to tenants is not private land but *jirayati* land; and a suit for recovery of rent due from the lessee of such lands must be filed in the Revenue Court and not in the Civil Court.

P.V. Rajamannar and *K. Subba Rao* for Petitioner.

V.V. Chowdary and *A. Venkataswami* for Respondent.

K.S.

Burn, O.C.J., and Happell, J.
8th January, 1941

Saiyid Muhammad Sahib *v.* Subramaniyan Chettiar.
A.S. No. 65 of 1937.

Civil Procedure Code (V of 1908), S. 35 (2)—Plaintiff failing to make out his case—Right of defendant to costs—Written statement making allegations of more extensive nature than defendant able to establish—Effect on right to costs.

The onus of making out his case always lies upon the plaintiff in a claim suit and if he fails to make out his case his suit has to be dismissed and the fact that the defendant in his written statement has made allegations of a more extensive nature than he was able to establish is not a sufficient reason for disallowing the successful defendant's costs.

B. Sitarama Rao and *T. K. Sundararaman* for Appellant.

K.S. Venkatarama Aiyar for Respondent.

K.S.

Abdur Rahman, J
17th January, 1941

Kuppuswami Naidu *v.* Kuppuswami Naidu and others.
S.A. No. 92 of 1938.

Adverse possession—Suit for setting aside a sale and for possession—Plaintiff away from India undergoing imprisonment in Andamans at date of sale—If entitled to exemption from bar of limitation for period when he was not in India.

While plaintiff was undergoing imprisonment in the Andamans on a sentence of transportation for life his step-mother alienated some properties in April, 1915. The plaintiff came back in 1926 and brought a suit in 1934 for setting aside the sale and for recovery of possession. It was contended on behalf of the plaintiff that adverse possession should not be held to start against him when he was not in India especially when his absence was not voluntary but enforced.

Held, that it is no ground of exemption under the Limitation Act. Whether the plaintiff was voluntarily out of India or involuntarily so is immaterial. The possession of the defendant need not be known to the plaintiff to be adverse as long as it is open and capable of being known by the parties who are interested in the property. 66 M.L.J. 134 (P.C.), followed.

C.R. Rajagopalachari for Appellants.

N. Gopala Menon and *V.M. Ramaswami Mudaliar* for Respondents.

K.S.

N. R. C.

Happell, J.
20*th January*, 1941.

Manikyam *v*. Manikyamma.
C.R.P. No. 9 of 1939.

Civil Procedure Code (V of 1908), S. 60, Cl. (b)—"Musical instruments" belonging to judgment-debtor—If exempt from attachment—"Artisan" if includes "artists".

A musician is not employed in an industrial art and a wider meaning cannot be attached to the word "artisan" to include a musician. Musical instruments are not "tools of an artisan" within the meaning of S 60 (*b*), Civil Procedure Code and are not exempt from attachment.

P.V. Vallabhacharyulu for Petitioner

T. Satyanarayana for Respondent.

K.S.

Wadsworth, J.
22*nd January*, 1941.

Suranna *v* Chendramma.
S.A. No. 102 of 1938.

Easement—Private right of way—If can be acquired by person exercising his right as a member of the public.

An individual who is exercising his right of way as a member of the public cannot at the same time have the necessary *animus* to establish from such acts of user the acquisition of a private right of easement.

V. Suryanarayana for Appellant

M. Appa Row for Respondents.

K.S.

Abdur Rahman, J.
24*th January*, 1941

Kachi Muhaidin Tharaganar *v*. Sainambu Ammal.
S.A. No. 94 of 1938.

Muhammedan Law—Shafei sect—Guardianship and custody—Right of mother to custody of daughters—Right to maintenance from father after attaining puberty.

Among the Shafeis the mother is competent to retain her daughters' custody in spite of their having attained puberty up to the time that they were actually married. But this has no bearing on their right to maintenance. If the father has any right to the custody of his children he is entitled to enforce that right but the fact that he has not done so or that his children are residing elsewhere does not deprive them of their right to recover maintenance from their father. The father even if entitled to custody of his daughters after puberty is liable for their maintenance up to the time they are married. The father being the legal guardian is also beside the point. Authorities reviewed.

T.P. Gopalakrishna Aiyar for Appellant

N.R. Sesha Aiyar for Respondent.

K.S.

Wadsworth, J.
24*th January*, 1941.

Muthukrishna Aiyar *v*. Savithri Ammal.
A.A.A.O. No. 200 of 1939.

Civil Procedure Code (V of 1908), S. 47—Objection to execution raised by party or his representative setting up paramount title—Matter relates to execution of decree and decision is appealable.

When an objection is put forward to execution by a party or his representative on the ground that he has some paramount right which prevents the execution of the decree against him, that is, an objection which he purports to put forward under S. 47, C.P.Code and the matter does relate to

the execution of the decree. Whether the objection is good or not will depend on various considerations, but the validity of the objection will not govern the procedure by which it is to be decided. If it is decided by the procedure under S. 47 a right of appeal will result from the decision. A.I.R. 1927 Mad. 481 and 71 M.L.J. 511, discussed.

M. Subbaraya Aiyar for Appellant.

T.L. Venkatarama Aiyar for Respondent.

K.S.

Pandrang Row, J.
24th January, 1941.

Ponnuswami Udayan *v.* Chidambara Udayan.
S.A. No. 7 of 1941.

Practice—Second Appeal—Question of fact—Reversal of finding of fact of trial Court by lower appellate Court—If can be interfered with in second appeal.

It is not the province of the second appellate Court to decide whether on a pure question of fact, the lower appellate Court is right or the trial Court is right, because even assuming that the lower appellate Court was not right, there is no right in the High Court to say so and indeed no second appeal is competent when the only question that is raised therein is a question of fact. Though the interests involved may be considerable it does not cease to be a question of fact.

V.T. Rangaswami Aiyangar and *K. Ramaswami Aiyangar* for Appellant.

Respondent not represented.

K.S.

Mockett, J.
3rd February, 1941.

Province of Madras. *v.* Kamaraja Pandiya Naicker.
C.R.P. No. 356 of 1940.

Limitation Act (IX of 1908), S. 5—Appeal involving a principle of some importance—If sufficient ground for excusing delay in filing—Costs ordered in excusing delay—Receipt "without prejudice"—If bar to revision petition against order excusing delay.

It is not open to the judge to excuse the delay in filing an appeal merely on the ground that the appeal involves a principle of some importance and injustice might be done if the right of appeal is denied because of the delay.

Where after an order excusing delay in filing the appeal on condition that the appellant paid the costs of the respondent, the mere receipt by the respondent of the costs "without prejudice" does not bar a petition to the High Court to revise the order excusing the delay. 58 M.L.J. 137, relied on.

The Government Pleader B. Sitarama Rao for Petitioner.

V. Govindarajachari for Respondent.

K.S.

Somayya, J.
4th February, 1941.

Kesavalu *v.* Venkatarama Chettiar and another.
C.R.P. No. 567 of 1939.

Civil Procedure Code (V of 1908), S. 35 and O. 7, r. 10—Returning plaint for presentation to proper Court—No jurisdiction to make payment of costs to defendants a condition precedent to the presentation in proper Court.

When passing an order under O. 7, r. 10, C.P.Code, returning a plaint for presentation to the proper Court, the Court has no jurisdiction to im-

pose a condition that the plaintiff should before representing the plaint, pay the costs of the defendant as a condition precedent. Though S. 35, C. P. Code states that the fact that the Court had no jurisdiction to try a suit should be no bar to the exercise of the power to order costs, there is no power to make payment of costs a condition precedent to the filing of the suit in the proper Court.

K.S. Rajagopala Aiyangar, and *K.S. Ramaratnam* for Petitioner.

N. Rajagopala Aiyangar for Respondent.

K.S.

Venkataramana Rao and Abdur Rahman, JJ. *4th February*, 1941. — Appaswami Palanoor *v.* The Hongkong-Shanghai Banking Corporation, Ltd., and others. **C.M.A. No. 391 of 1938.**

Practice—Execution—Attachment before judgment—If can be deemed to have been abandoned by mere proceeding against other properties.

B filed a suit to recover a sum of money and obtained an attachment before judgment of the debtor's property. After the suit was decreed the debtor mortgaged the attached property to *X* who subsequently without impleading *B*, sued on the mortgage, obtained a decree, in execution whereof he purchased the hypotheca. *B* subsequently assigned his decree to *A* who in pursuance of the attachment before judgment brought the property to sale and purchased it himself. *A* having dispossessed, *X*, *X* took out an application for restoration of possession on the ground that the attachment should be deemed to have been abandoned by reason of the decree-holder's conduct in taking execution proceedings against other properties of the judgment-debtor.

Held, that the mere taking out of execution proceedings in respect of other properties of the judgment-debtor is not an indication of abandonment of the earlier attachment by the decree-holder. Under law apart from the question of estoppel there can be no question of abandonment. An attachment would come to an end only by one of the methods prescribed under the Civil Procedure Code such as payment to the decree-holder under O. 21, r. 55 or dismissal of the execution application under r. 57.

K. V. Krishnaswami Aiyar and *T. L. Venkatarama Aiyar* for Appellant.

Sir A. Krishnaswami Aiyar, K. Subramaniam and *C. Krishnaswami Aiyar* instructed by *King* and *Partridge* for Respondents.

K.S.

Krishnaswami Aiyangar, J. *4th February*, 1941. — Re: E.V.D'Silva, an insolvent. **Application No. 336 of 1940. I.P. No. 217 of 1940.**

Presidency Towns Insolvency Act (*III of* 1909), *Ss.* 2 (e), 38 (3) *and* 60 (1)—*Insolvency of public servant—Salary below the attachable limit under Civil Procedure Code—Order for allocation out of salary—Validity*

On the application of the Official Assignee the insolvent, a clerk in the Public Works department workshop drawing a salary of Rs. 60 per month, was ordered by the Master of the High Court to pay an allocation of Rs. 4 a month out of his salary. On appeal,

Held, (*i*) S. 60 (1) of the Act limits the portion of the salary to be paid to the Official Assignee to the attachable income of the insolvent;

(*ii*) An order for appropriation of salary can be and is always only under S. 60 of the Presidency Towns Insolvency Act;

(*iii*) The salary accrued due to the insolvent in the hands of his employer did not fall within the definition of "property" in S. 2 (*e*) of the Act, as the insolvent has no disposing power over it;

(*iv*) Though, theoretically, it would cease to be "salary" as soon as it was paid into the insolvent's hands, there was no power to issue an anticipatory process to restrain the insolvent from dealing with his salary after it was received;

(*v*) Prospective salary is not property vested in the Official Assignee and a prospective order cannot be made impounding the future personal earnings of an insolvent and directing appropriation of the same without regard to the attachable limit, fixed by S. 60, C.P.Code and S. 60 (1) of the Presidency Towns Insolvency Act on public grounds;

(*vi*) S. 83 (3) does not apply, as it refers to property that has vested and only requires to be realised;

(*vii*) The practice of the Court in ordering allocations even where the Insolvent's salary is below the attachable limit cannot be followed as it is against the provisions of the Act;

(*viii*) Whether salary or other income vests or not in the Official Assignee, the Court can make an order for appropriation if empowered under S. 60.

Corresponding provisions of the English Bankruptcy Act referred to.

S. J. S. Fernandes for the Insolvent.

The Official Assignee (V. Thiyagaraja Aiyar) in person.

K.S.

Pandrang Row and Somayya, JJ.
5th February, 1941.

Swayampakula Subbaramayya *v.* Swayampakula Venkatasubbamma.
Appeal No. 33 of 1939.

Hindu Law—Marriage in the anuloma form, if valid.

The plaintiffs who were *Kapus* (Sudras) by caste, alleging that they were respectively the widow, daughter and son of one *J*, a Brahmin, brought a suit for maintenance against the Brahmin sons and widow of the said *J*. The lower Court found in favour of the *factum* as well as the validity of the marriage of the first plaintiff with *J* and granted a decree for maintenance to all the plaintiffs. On appeal,

Held, that such a marriage was invalid, as anuloma marriages are prohibited for the present age and have become obsolete.

Texts and case-law fully discussed. Accounts of foreign travellers considered. Mayne's Hindu Law, 10th Edition, Ss. 123-127 referred to. I.L.R. 52 Mad. 160, disapproved. I.L.R. 28 All. 458 and 14 Bom. L R. 547, followed. I.L.R. 46 Bom. 871 and I. L. R. 55 Bom. 1, dissented from.

The Advocate-General (Sir A. Krishnaswami Aiyar), M.S. Ramachandra Rao and *D.R. Krishna Rao* for Appellants.

P.V. Rajamannar and *K. Subba Rao* for Respondents.

K.S.

Abdur Rahman, J.
5th February, 1941.

The Vedarayaswami Devasthanam represented by its Managing Trustee, Sri La Sri Subramania Pandarasannadhi *v.* Pichu Aiyar and others.
S.A. Nos. 1008 to 1035 of 1940.

Court Fees Act (VII of 1870), S. 7 (11) (a)—Art. II 17 (18) and S. 12 (2)—Madras Estates Land Act (I of 1908), S. 56—Suits under — Court-fee payable on appeals and second appeals—Excess court-fee paid in

the lower Court due to a bona fide *mistake—Power of the High Court to order refund.*

Though plaints in suits under S. 56 of the Estates Land Act, which are filed in the Revenue Courts are exempted from paying any court-fee, on appeals therefrom to the District Court and the High Court, court-fee is payable under S. 7 (11) (*a*) and not under Art. II, 17 (18) of the Court-Fees Act.

When the appeals come before the High Court for consideration under S. 12 (2) of the Court-Fees Act,—the High Court can exercise its inherent power to direct refund of the excess court-fee paid in the lower Court due to a *bona fide* mistake.

A V. Viswanatha Sastri for *R. Sundaralingam*, for Appellant.

T. Krishna Rao for Government Pleader.

K.S.

Mockett, J.
10th February, 1941.

S. Kuppusami Chettiar *v.* Subbaraya Chettiar and others.

C.M.A. No. 240 of 1940.

Practice—Sanction to prosecute for offences committed in the course of proceedings before the Court—Considerations.

In sanctioning a prosecution for offences committed in the course of proceedings before the Court, the Court should consider not only whether there was a *prima facie* case but also whether it was not against public interest to allow the criminal proceedings.

K. S. Jayarama Aiyar and *G. Gopalaswami* for appellant

K.V. Ramachandra Aiyar for Respondent

The Public Prosecutor for the Crown.

K.S.

The Chief Justice and Happell, J
10th February, 1941.

C. D. Parthasarathy *v.* Madras Publishing House, Ltd., and two others.

O.S.A. No. 59 of 1940

Companies Act (*VII of* 1913), *S.* 230 (1), *sub-S.* 2*—Liquidation — Preferential claim for salary of employee—Mortgage of whole of the immovable and movable effects of company and floating charge over book debts—Effect.*

A mortgage of the whole of the immovable and movable effects of a company including a floating charge over the book debts is a debenture and an employee is entitled to priority by virtue of S. 230 (1) 2 of the Act over the assets of the company subject to the floating charge on a winding up, in respect of arrears of salary to the extent of Rs. 1,000. (1929) 1 Ch. 498, followed.

P. S. Narayanaswami Aiyar for Apppellant.

T.T. Vijayaraghavan for the *Official Liquidator*.

C R. Rajagopalachariar for the debenture-holder Respondent.

S.V. Shenoy for petitioning creditor.

K.S.

Wadsworth, J.
10th February, 1941.

Venkatakrishna Rao *v.* Nammayya and others.

C.R.P. No. 677 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 28*—Applicability to decrees under S.* 145 *of the Madras Estates Land Act—Transferee of holding not impleaded in suit for rent—If a judgment-debtor, entitled to apply under S.* 28 *of Act IV of* 1938.

A got a money decree against *X* and *Y* who were registered pattadars and in execution of that decree purchased the holding in court auction on 26—11—1934. In the following year he got possession through Court and applied to the registered proprietor for recognition of the transfer. Thereafter the proprietor received rents from *A* though there was no formal order recognising the transfer. In 1937 the registered proprietor filed a suit for rent of the holding, impleading only *X* and *Y* the former pattadars, got a decree and assigned it to *C* who executed the decree and brought the holding for sale and it was purchased by *B* on 25—2—1938. Thereupon *A* made a deposit for the rent due for fasli 1347 under S. 15 of Act IV of 1938 and applied for setting aside the sale.

Held, as the petitioner had formally applied for recognition of the transfer and the land-holder after such application had received payments of rent from *A*, S. 145 of the Madras Estates Land Act compels the proprietor to recognise the transfer and deprives him of the power to get a decree binding the holding without impleading the transferee. 70 M.L. J. 575, applied. The decree obtained without impleading *A* will not bind *A* and *A* cannot be regarded as a "judgment-debtor" entitled to proceed under S. 23 of Act IV of 1938.

K. Kameswara Rao for Petitioner.

V. Viyyanna for Respondent.

K.S.

Lakshmana Rao, J. Seshadri Aiyangar *v.*
11*th February*, 1941. Public Prosecutor.

Crl.R.C. No. 1117 of 1940 and
Crl.R.P. No. 1061 of 1940.

Indian Penal Code (*XLV of* 1860), *S.* 211—*Case taken on file after investigation under S.* 202, *Criminal Procedure Code—Subsequent discharge of accused—Complaint under S.* 211 *of I.P.Code—If justifiable.*

Where a case was taken on file after investigation by the police under S. 202, Criminal Procedure Code the subsequent discharge of the accused would not justify the making of a complaint under S. 211 of the Indian Penal Code.

K. Umamaheswaran for Petitioner.

A.S. Sivakaminathan for *Public Prosecutor* for the Crown.

K.S.

Wadsworth, J. Perumal Naidu *v.*
11*th February*, 1941 Rajammal.

C.R.P. No. 75 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 8 (1)—*Renewed promissory notes—Payments towards—Appropriations—Presumptions.*

Payment towards the principal of a renewed promissory note cannot be regarded as necessarily appropriated to the principal of the original note and the debtor has to prove that it was not appropriated to the interest included in the principal of the second note.

Further, open payments made in respect of a renewed note must be deemed to have been appropriated when the amount of a note in further renewal was calculated and the debtor has to prove that they were not appropriated to interest.

T.S. Ramaswami Aiyar for Petitioner.

S.S. Ramachandra Aiyar for Respondent.

K.S.

The Chief Justice and Happell, J.
12th February, 1941.

Boganathula Venkatasamy *v.* Jangiti Maduliti and others.
C.M.P. No. 6968 of 1940.

Madras Debt Conciliation Act (XI of 1936), S. 10 (2)—Creditor requesting Board to summon a document as evidence of the debt—Duty of Board to summon—Order declaring the debt discharged for failure to furnish proper statement—Propriety in the circumstances.

Where a creditor requested the Debt Conciliation Board to summon a mortgage deed in the possession of his brother as evidence of his debt but the Board did not so summon,

Held, that it was the duty of the Board to summon the document and the Board was wrong in not summoning the same and in declaring the debt discharged on the ground that the creditor did not furnish a proper statement under S. 10 (2) of the Act.

K. Krishnaswami Aiyangar and *K.S. Jayaram* for Petitioner.

S. Venkatesa Aiyangar for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
13th February, 1941.

Venkateswaralu *v.* Venkatarangam.
C.R.P. No. 239 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 8 and 9—Scope—Partition of debt between the creditors and execution of separate promissory notes by same debtor—Effect.

A promissory note was executed on 15—5—1930 in favour of two brothers *A* and *B*. On a partition between *A* and *B's* son after *B's* death the debtor executed separate promissory notes on 29—9—1934. In an application for scaling down,

Held, that the principle laid down in *Ramasubbier* v. *Rama Aiyar*, (1941) 1 M.L.J. 89 governed the case. The principle is the same whether the new debts are equal or unequal to the old one and the debt must be scaled down on the basis of the promissory note of 1934.

N. Vasudeva Rao for Petitioner.

K. Bhimasankaram for Respondent.

K.S.

Wadsworth, J.
14th February, 1941.

Athinarayana Konar *v.* Subramania Aiyar.
S.A. No. 231 of 1939.

Execution — Attachment of property subject to a contract to sell — Rights.

Though a contract to sell does not, having regard to the terms of S. 54 of the Transfer of Property Act create any interest in or charge on the property, it does give rise to an obligation which limits the right of the judgment-debtor and the attachment of the right, title and interest of the judgment-debtor is subject to any such limitation by which the judgment-debtor was bound. (1939) 2 M.L.J. 822, relied on.

No doubt if the attachment is followed by a Court sale and the purchaser at the court sale has no notice of such obligation, he will get a good title and the promisee under the private contract would be left to seek his remedy against his promisor. But where in pursuance of the contract, a registered sale deed is executed subsequent to the attachment, the sale will not be one contrary to the attachment. The absence of notice on the part of the attaching creditor as to the existence of the contract cannot give such creditor any higher rights.

G.N. Thirumalachariar and *G. Thiruvenkatachariar* for Appellants.

T.S. Venkatesa Aiyar for Respondent.

K.S.

Wadsworth, J.
18*th February*, 1941.

Muthusami Pillai *v.*
R.S.A.Sankara Aiyar.
C.R.P. No. 899 of 1938.

Madras Agriculturists' Relief Act (IV of 1938), S. 9—Account after 1—10—1932—Settlement at the end of every year—If can be re-opened

Unless a debt falling under S. 9 relates back to a debt incurred before 1—10—1932 so as to involve the provisions of S. 8 there is nothing in S.9 to justify the re-opening of settlements or the re-appropriation of payments on the basis of a hypothetical original principal. Where the first loan was one of 1933 only, the proviso to S. 9 cannot apply and the Court cannot re-open settlements of account made by the parties at the end of each year so as to treat them as renewals of the earlier loans.

S. V. Venugopalachari for *R. Sundaralingam* for Petitioner.

T.M. Ramaswami Aiyar for Respondents.

K.S.

[F.B.]

The Chief Justice, Mockett and Krishnaswami Aiyangar, JJ.
18*th February*, 1941.

Mir Ghulam Hussain *v.*
Aiyisha Bibi and others.
L.P.A. No. 14 of 1940.

Guardian and ward—Mother appointed guardian by Court—Sale of ward's property by guardian without sanction of Court—Sale voidable not void—Suit by assignee from ward more than three years after ward attaining majority — Barred by limitation—Practice—Letters Patent Appeal Leave — If can be confined to particular points only — Letters Patent (Madras), Cl. 15.

The mother who was appointed by the Court as guardian of her minor children *A*, *B* and *C* sold certain items of property belonging to them without the Court's sanction. The wards after *A* and *B* had attained majority sold their shares to *X*. *X* filed a suit more than three years after *A* had attained majority for partition and recovery of possession from the vendee of the guardian. Leave to file a Letters Patent Appeal against the decision in the second appeal was confined to the share of *A*. On the Letters Patent Appeal,

Held, (*i*) that it was not open to a judge granting leave under cl. 15 of the Letters Patent to confine the leave to one or more particular points. The whole case was open for consideration by the Bench hearing the Letters Patent Appeal;

(*ii*) that the alienation by the mother without the sanction of the Court was only voidable and not void and the suit as regards the share of the ward who had attained majority more than three years prior to the suit was barred by limitation.

Decision of *Ramesam* and *Cornish, JJ.*, in Appeal No. 526 of 1931, overruled;

(*iii*) And as regards the share of the ward who was still a minor on the date of the sale by the wards to *X* the suit must fail.

D. Ramaswami Aiyangar for Appellant.

S. Panchapakesa Sastri for *T. V. Ramanatha Aiyar* for Respondent.

K.S.

King and Patanjali Sastri, JJ. Alagappa Chettiar *v.*
19th February, 1941. Narayanan Chettiar and others.
A.S. Nos. 188 and 189 of 1938.

Partnership—Joint family manager a partner—Suit for dissolution by—Minor grandson of plaintiff impleaded as pro forma *party—Compromise and receipt of amount by plaintiff—Suit by minor after attaining majority to set aside compromise—C.P.Code, O. 32, r. 7—Applicability.*

The manager of a joint Hindu family who was a partner on behalf of the joint family filed a suit for dissolution impleading his minor grandson as a *pro forma* party and then compromised the suit and received an amount on behalf of himself and his grandson. The grandson after becoming a major filed a suit to set aside the compromise as not binding on him and alleged *inter alia* that sanction of the Court was not obtained for the compromise.

Held, the grandson had no independent right in the suit for dissolution. No member of a Hindu joint family apart from the manager or the partner member could claim any interest in a continuing partnership. O. 32, r.7, cannot apply to cases like this wherein the minor was not interested in his own right.

T.R. Venkatarama Sastri, E. Vinayaka Rao and *C.S. Rama Rao Saheb* for Appellant.

Sir A. Krishnaswami Aiyar and *V. Ramaswami Aiyar* for Defendants.

K.S.

King and Patanjali Sastri, JJ. Vankadan Somappa *v.*
19th February, 1941. N. Venkataswami Chetty.
Appeal No. 72 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 3 (ii), *Proviso A—Partner of a firm which paid income-tax—If "agriculturist" under the definition in the Act.*

A partner in a firm which was assessed to income-tax for 1937-1938 (though the partner was not individually assessed) is not an "agriculturist" as defined in the Act.

Ch. Raghava Rao and *Rajaram* for Appellant.

V. Ramaswami Aiyar and *S. Narasinga Rao* for Respondent.

K.S.

Abdur Rahman, J. Minor, Sethu *alias* Ramanathan
19th February, 1941. *v.* M.V.N Palaniappa Chettiar.
S.A. No. 518 of 1940.

Court-Fees Act (VII of 1870), *S.* 7 (3) *and* (9)—*Suit for redemption of pledged jewels—Proper court-fee*

S. 7 cl. 9 of the Court-Fees Act no doubt provides for the redemption of a mortgage and permits court-fees to be paid on the amount indicated in the mortgage instrument, but there is a material difference between a mortgage and a pledge and where a suit is filed for the recovery of jewels valued at Rs. 5,000 on payment of Rs. 900 borrowed on the pledge of the jewels, S. 7, cl. (3) of the Court-Fees Act will be the proper provision applicable and the court-fee payable would be on the value of the jewels and not on the loan.

T. L. Venkatarama Aiyar for Appellant.

R. Gopalaswami Aiyangar for Respondent.

The Government Pleader (*B. Sitarama Rao*) for the Government.

K.S.

Somayya, J.
3rd February, 1941.

Mohamed Ibrahim *v.*
Muhamad Ibrahim.
C.R.P. No. 1554 of 1940.

Practice—Amendment of pleadings — New defence inconsistent with original defence—If ground for refusing amendment.

Even if new defences sought to be set up by an amendment are inconsistent with the original defence that will be no ground for refusing the amendment asked for.

Rafiuddin Ahmed for Petitioner.

A. Srirangachariar for Respondent.

K.S.

The Chief Justice and Happell, J.
18th February, 1941.

Varadaraja Pillai *v.*
Rukmani Ammal.
O.S.A. No. 52 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 7, 8 and 9—"Decree"—Preliminary decree on mortgage passed after the Act came into force—If liable to be scaled down.

Where a preliminary decree on a mortgage had been passed after the Agriculturists' Relief Act came into force, the debtor cannot subsequently apply to scale it down. *Kotayya* v. *Venkata Punnayya*, (1940) 2 M.L.J. 202, followed.

It is the preliminary decree in a mortgage suit which fixes the rights and liabilities of the parties and it only gives time to the mortgagor to pay off the decretal amount and redeem the mortgage. The final decree does not change the position except that it gives the mortgagee the right to sell the property for realising the amount declared to be due by the preliminary decree.

K.P. Ramakrishna Aiyar for Appellant.

N. Panchanatha Aiyar for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
20th February, 1941.

P.L.P. Devarayan Chettiar *v.*
S.P. Subramania Iyer and another.
C.R.P. No. 597 of 1937.

Madras Agriculturists' Relief Act (IV of 1938), S. 8, Explanation—S. 3 (ii)—Renewals by two out of three original debtors—Effect—Crucial date for determining whether debtor is "Agriculturist".

A promissory note of 1929 executed by *R*, *S* and *T* was discharged by another note of 1932 by them. On 29—7—1935 the suit note was executed by *R* and *S* alone discharging the note of 1932. It was not a case of joint family debt. It was proved that in May 1937 *R* had purchased lands and hence would be an "agriculturist" under Madras Act IV of 1938. *S* was an agriculturist throughout. It was not known whether *T* was or was not an agriculturist. On an application for scaling down,

Held, that the debt of 1932 was apparently due jointly and severally from *R*, *S* and *T* and it was discharged by another debt due from *R* and *S*, which was sufficient to make the latter debt an 'inclusion' in a fresh document, of the former debt. (1940) 2 M.L.J. 651 and (1940) 2 M.L.J. 786, followed.

(*i*) The liability being joint and several the subsequent note by *R* and *S* is a renewal of the earlier liability;

(*ii*) The relevant period when a debtor has to be an agriculturist to claim the benefit of the Act is the period from and after 1—10—1937 having regard to the proviso to S. 3 (*ii*) of the Act. The purchase of land

N.R.C.

in May, 1937 was sufficient to qualify *B* to claim the benefits of the Act as an agriculturist. (1940) 2 M.L.J. 887, applied. (1940) 2 M.L.J. 174, referred to.

K. S. Ramabhadra Aiyar with *N. G. Krishnamachari* for Petitioner.

V.S. Narasimhachar and *N. Appu Rao* for Respondents.

K.S.

The Chief Justice and Happell, J.
25th February, 1941.

Sri Rajah Venkatadri Appa Row Garu *v.* Timmaraju Venkata Kutumba Row.
L.P.A. No. 15 of 1940.

Civil Procedure Code (V of 1908), O. 21, r, 89—Amount paid to save property—Subsequent suit to recover as paid under coercion—Maintainability.

The defendant, in execution of a money decree against a third party, attached the properties in the possession of the plaintiff which the latter had purchased prior to the attachment. Plaintiff intervened with a claim petition which was rejected. The properties were sold in execution and purchased by the defendant, but plaintiff got the sale set aside by deposit of the requisite amount under O. 21, r. 89, C.P.Code within one year from the claim order. The defendant attached the properties in execution of another decree obtained against the same third party and a second claim petition by the plaintiff was successful. The defendant did not file a suit under O. 21, r. 63, challenging the second claim order and plaintiff's title became perfect. Plaintiff filed the present suit to recover the money deposited under O. 21, r. 89, C.P.Code on the ground that the money was paid under coercion.

Held, that the plaintiff was entitled to recover the amount though it was deposited voluntarily under O. 21, r. 89 to save his own property. 34 L.W. 399, followed. 58 Mad. 972 (F.B.) held not to touch cases of money paid under coercion of law for which a statutory provision is made by S. 72 of the Indian Contract Act. 40 Cal. 598 (P.C.), followed.

Y. Govindarajulu and *B. Lakshminarayana* for Appellant.

M.S. Ramachandra Rao for Respondent.

K.S.

Wadsworth, J.
25th February, 1941.

Bullayya *v.* Lakshminarayana.
C.R.P. No. 1430 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 8, explanation—Promissory note in favour of A, B *and* C *discharged by a fresh promissory note in favour of* A *alone—Scaling down.*

In settlement of a *khata* account a promissory note was executed in favour of the partners, *A*, *B* and *C* by *D* who subsequently executed another promissory note in favour of *A* alone in discharge of the first note. In a suit by the assignee of the promissory note from *A*,

Held, that (*i*) the creditor under the second note is not the same as those under the first note within the meaning of the *explanation* to S. 8;

(*ii*) that the debt cannot be sealed down beyond the subsequent promissory note executed in favour of *A* alone; (1940) 2 M.L.J. 664, applied.

Ch. Raghava Rao for Petitioner.

K. Krishnamurthy for Respondent.

K.S.

Wadsworth, J.
26th February, 1941.

Nagabushanam *v.* Venkayya.
C.R.P. No. 1451 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 8 (iii), *Proviso—Sole legatee under will executing in* 1936 *a promissory note in discharge of earlier pronotes executed by the testator who died in* 1935*—Scaling down.*

The sole legatee under a will executed in 1936 a promissory note in discharge of earlier pronotes executed by the testator who died in 1935. In a suit on the pronote the legatee being himself an agriculturist applied for scaling down the debt.

Held, that to treat the suit note as a renewal of the prior notes the debtor must show that they were debts due by an agriculturist and that the maker of the notes—the testator—was an agriculturist on and after 1—10—1937. The testator having died in 1935 cannot be treated as an agriculturist on 1—10—1937 and the Court cannot go behind the suit note in scaling down.

Quaere, whether the legatee could claim that his note was in renewal of the testator's debt in case the testator had lived long enough to make the definition of 'agriculturist' applicable to him.

K. Bhimasankaram for Petitioner.

K. Kottayya for Respondent.

K.S.

Lakshmana Rao, J.
26th February, 1941.

Abdul Satar Sahib *v* Rex.
Crl.R.C. No. 208 of 1941.

Madras Motor Vehicles Act (*VIII of* 1914), *S* 42 (1)*—Overloading a bus—Owner of bus when liable for offence.*

In a prosecution of the owner, driver and conductor of a bus for the offence of overloading it was found that the owner was not in the bus and there was no evidence that the owner had permitted the driver and conductor to overload the bus. In the circumstances,

Held, that the owner cannot be convicted for the offence.

G Gopalaswami for Petitioners.

K. Venkataraghavachariar for the Crown

K.S.

King and Patanjali Sastri, JJ.
26th February, 1941.

Palaniappa *v* Ramaswami and others.
A S. No 158 of 1938.

Will—Bequest to widow for life and on her death to the named sons and their male issue—Male issue born to one of the sons after the death of testator and before death of widow—Construction.

*Practice—*Res judicata*—Decision of District Munsif in the exercise of insolvency jurisdiction—Subsequent civil suit in Subordinate Judge's Court—Whether not barred as being beyond the pecuniary jurisdiction of the Munsif—C.P.Code, S.* 11

A testator bequeathed his properties to his widow for life, after her to his sons *K* and *R* and their male issue and in case they had no male issue *K* and *R* were to take their respective shares. At the time of the testator's death the sons had no male issue but before the death of the widow a son *X* was born to *R*. *K* predeceased the widow and *R* having been adjudged an insolvent, the District Munsif exercising insolvency jurisdiction construed the will and disallowed the claim of *X* to a half-share against *R* his insolvent father. *X* then filed a suit in the Subordinate Judge's Court for the recovery of the properties of the testator.

Held, that (*i*) *K* and *R* took a vested interest on the testator's death. 38 Cal. 468 (P.C.), followed;

(*ii*) *X* having been born before the death of the life estate holder obtained a vested interest and to that extent the shares of *K* and *R* became diminished. 40 Mad. 540, followed;

(*iii*) The decision of the District Munsif under S. 4 of the Provincial Insolvency Act is final and conclusive as between the parties, notwithstanding S. 11, C.P.Code, so as to bar the suit though it was beyond the pecuniary jurisdiction of the District Munsif's Court;

(*iv*) In the result *X* was held entitled to a one-sixth share of the estate, that is, one-third of the half-share of *K*.

K.V. Ramachandra Aiyar and *T. N. Sundaresa Aiyar* for Appellants.

K. Desikachari, *R. Viswanatha Aiyar* and *N. D. Varadachariar* for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
27th February, 1941.

Mrs. Iswariah *v.* Kannappa Chettiar.

O.S.A. No. 1 of 1941.

Madras Agriculturists' Relief Act (*IV of* 1938), *S* 3, *Proviso* C *and r* 7 *of the rules framed under S* 28—Intra vires.

A debtor proved that he had sold in February, 1935 his house property situate within a Municipality and that the purchaser was paying the property tax thereafter though the debtor's name continued in the municipal register. The trial Court relying on r. 7 of the rules framed under the Act by the Provincial Government permitted the debtor to let in evidence as to sale of his property in rebuttal of the certificate issued by the Collector under S. 28 of the Act and held that the debtor was consequently not excluded from the definition of the term agriculturist. On appeal it was contended that r. 7 was inconsistent with Proviso C and therefore *ultra vires*.

Held, that there was nothing repugnant to the apparent intention of Proviso C in this rule nor could it be said that the rule gave to the Proviso a meaning which was not its probable meaning. It was within the powers of the Provincial Government to make a rule which merely removed an ambiguity in a clause in a statute. The rule is *intra vires* the Provincial Government.

V. Radhakrishnaiah and *R. Venkataraman* for Appellant.

M. Subbaroya Aiyar and *T. S. Krishnamurthi Aiyar* for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
3rd March, 1941

Srinivasayya *v* Obula Raju

C.R.P. Nos 1689 & 1690 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S*. 3 (iii), *Proviso* D—*Debtor owning only a share in a* shrotriam—*Debtor's liability for his own share of* jodi *less than Rs.* 100—*Excluded from operation of proviso*

Where a debtor owns only a share in a *shrotriam* and his liability for his own share of the *jodi* is less than Rs. 100 he does not cease to be an 'agriculturist' and is entitled to the benefits of Act IV of 1938 though theoretically he may be liable to the Government for the whole of the *jodi* due on the *shrotriam*.

Kasturi Seshagiri Rao for Petitioners.

P. Basi Reddi for Respondent.

K.S.

Mockett, J.
4th February, 1941.

Maha Latchayya *v.* Adi Seshayya.
C.R.P. Nos. 17 and 566 of 1939.

Limitation Act (*IX of* 1908), *S. 4—Two contracts between same parties—Breach—Cause of action separately maintainable in Munsif's Court which reopened earlier — Single suit filed on the different causes of action in the Subordinate Judge's Court on reopening date under C.P. Code* (*V of* 1908), *O. 2, r. 3—Effect on claim based on earliest breach of contract which could have been filed in the Munsif's Court.*

In the place where the causes of action arose there was a District Munsif's Court whose jurisdiction was limited to Rs. 300 and a Subordinate Judge's Court, both having small cause jurisdiction. The Sub-Court was closed for the summer vacation from 1—5—1936 to 1—7—1936 and the District Munsif's Court was closed from 1—5—1936 to 11—6—1936. The defendant by two contracts contracted to deliver 1,000 tins of oil under each contract before 31—5—1933 and 30—7—1933 respectively. On a breach of contract the plaintiff filed a suit in the Sub-Court on 2—7—1936 (the reopening date) for damages, joining under O. 2, r. 3, C.P. Code, the causes of action in respect of the breach of the 1st and 2nd contracts. The claim in respect of the first contract was for Rs. 240 and that under the second Rs. 609. On objection being raised that as the cause of action relating to the breach of the first contract was one within the jurisdiction of the Munsif's Court a suit not having been filed there on the reopening date of that Court, the claim was barred by limitation,

Held, that where the plaintiff has united several causes of action against the same defendant before a Court competent to try, not necessarily those causes of action separately but the suit as a whole, when those causes of action are combined under O. 2, r. 3 of the Code of Civil Procedure, the question of limitation under Ss. 3 and 4 of the Limitation Act is to be regarded with special reference to the jurisdiction of that Court to try the suit and not with reference to the jurisdiction of other Courts which might have been able to try those suits when split up had they been brought before them. There is no reason to imply any restrictions on the facilities given by O. 2, r. 3 to a plaintiff to join several causes of action because it happens that another Court might have tried one of those causes of action sued on.

V. Govindarajachari and *N. Vasudeva Rao* for Petitioner.
P. Satyanarayana Rao and *P. Sivaramakrishnayya* for Respondents.

K.S.

Wadsworth, J.
11th February, 1941.

Sree Rajasekharaswami *v.* Punnayya.
C.R.P. No. 260 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 3 (iii)—*"Debt"—If includes liability for rent.*

There is nothing in S. 3 (*iii*) of Act IV of 1938 to exclude an ordinary contractual liability for rent not falling within its definition in S. 3 (*iv*), from the definition of 'debt' in S. 3 (*iii*).

P. Satyanarayana Rao for Petitioner.
Ch. Raghava Rao for Respondent.

K.S.

Wadsworth, J.
11th February, 1941.

Manattil Ali *v.* Vazhapulli Varial.
C.R.P. No. 288 of 1939.

Stamp Act (*II of* 1899), *Ss.* 2 *and* 35—*Negotiable instrument executed in Cochin State bearing a British Indian stamp—Enforceability in British India.*

N R C

A promissory note executed in the Cochin State bore a British Indian stamp. It was contended in defence to a suit on the note that there was a breach of the Cochin law and therefore it was not admissible in evidence.

Held, that there is nothing in S. 35 of the Stamp Act to exclude from evidence a document which has not been properly stamped according to the law of a foreign State. The definitions of 'chargeable' and 'duly stamped' in S. 2 of the Stamp Act make it clear that the Act is only concerned with duty leviable under the law of British India. S. 134 of the Negotiable Instruments Act relates only to liabilities under an instrument and not to the admissibility of that instrument in evidence. Therefore an instrument which is correctly stamped according to the law of British India can be admitted in evidence and the alleged breach of the Cochin stamp law is no defence to the suit.

P. Govinda Menon and *P. K. Moidinkutti* for Petitioner.

D. A. Krishna Variar for Respondent.

K.S.

Wadsworth, J.
12th February, 1941.

Veeranna *v.* Silar Baksha.
C.R.P. No. 277 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Scaling down decree after sale had been confirmed on 12—7—1937—Stay of delivery of possession cannot be ordered.

Where a sale in execution of a decree was held on 9—6—1937 and it was confirmed on 12—7—1937 but the decree-holder purchaser had not taken possession on 11—10—1939 when the applications under Ss. 19 and 23 of Act IV of 1938 were made,

Held, that the application under S. 23 was barred and the scaling down of the decree cannot affect the sale which had become final.

Kasturi Seshagiri Rao for Petitioner.

A. Gopalacharlu for Respondent.

K.S.

Patanjali Sastri, J.
14th February, 1941.

Ramalakshmamma, Petitioner.
C.R.P. No. 91 of 1941.

Hindu Law — Daughter claiming under alleged will of her father — Necessity to prove her title.

A plaintiff who claims under an alleged will of her father will have to establish her title to the property even if she has managed somehow to get possession.

(1940) 2 M.L.J. 572, distinguished.

P. Satyanarayana Rao for Petitioner.

K.S.

Venkataramana Rao and Somayya, JJ.
14th February, 1941.

Rama Ayyar *v.*
Madhava Rao and others.
Appeal No. 87 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 10 (2)—Usufructuary mortgage with possession in lieu of interest in renewal of earlier simple mortgage—If liable to be scaled down—Clause in usufructuary morgage that simple mortgage should be kept alive—Effect.

A usufructuary mortgage dated 9—1—1926 was executed in renewal of an earlier simple mortgage and it stipulated that the mortgagee should be in possession of the property in lieu of interest, no rate of interest being stipulated as being payable to the mortgagee. There was a clause in the mortgage deed that the earlier simple mortgage should be kept alive. It was contended that the suit on the mortgage must be deemed to have been

laid even on the original mortgage and therefore the mortgagee was not entitled to claim the benefit of the exemption under S. 10 (2).

Held, that the clause providing that the earlier mortgage to be kept alive, was put in for the benefit of the mortgagee to shield him against any intervening mortgages and the plaint having been laid only on the mortgage of 9—1—1926 it came directly within S. 10 (2) of Act IV of 1938 and cannot be scaled down.

R. S, Srinivasachari and *K. V. Rajagopalan* for Appellant.

K. Bhashyam and *A. V. Baluswami* for Respondents.

K.S.

Wadsworth, J.
17th February, 1941.

Lakshmikantha Rao *v.* Venkatarama Rao.
C.R.P. No. 252 of 1939

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 9 *and* 15—*Promissory note for arrears of rent—Liability to be scaled down.*

In defence to a suit on a promissory note it was contended that the amount was not due because it represented rent which must be deemed to be discharged by reason of S. 15 of Act IV of 1938 though the promissory note was for arrears of rent.

Held, that it is a debt liable to be scaled down under S. 9 and not under S. 15. The debtor cannot compel the promisee to treat his claim as one for rent nor can he treat the liability as being without consideration on the ground that the claim for rent would be met by the defence under S. 15.

(1940) 2 M.L.J. 825, applied.

Ch. Raghava Rao for Petitioner.

S. Venugopala Rao for Respondent.

K.S.

Wadsworth, J.
18th February, 1941.

Venkatachariar *v.* Srinivasavaradachariar.
C.R.P. No. 576 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 20—*Joint judgment-debtors—Different debtors cannot make successive applications under S.* 20.

There cannot be a number of successive applications under S. 20 of Act IV of 1938, by different judgment-debtors. The decision in I.L.R. (1939) Mad. 530=(1939) 1 M.L.J. 888 with reference to joint families is equally applicable to joint debtors generally. There shall be only one stay of which all the judgment-debtors should take advantage simultaneously.

V. Rajagopalachari for Petitioner.

R. Gopalaswami Iyengar for Respondent.

K.S.

Mockett, J.
21st February, 1941.

Peda Venkatasubbayya *v.* Venkayya.
C.R.P. No. 1797 of 1940.

Madras Debt Conciliation Act (XI of 1936), *Ss.* 4, 9 *and* 25—*Dismissal of debtor's application under S.* 9 (b) *and stay under S.* 25 *dissolved—Application by a creditor to continue the conciliation proceeding—Effect.*

A stay of execution of a decree granted under S. 25 of the Debt Conciliation Act was dissolved on account of the dismissal of the debtor's petition under S. 9 (*b*) of the Act for conciliation of his debts, and after the dismissal of a petition by the debtor to restore it, another creditor impleaded in the first petition applied for conciliation of his debt along with the debt of the creditor who was executing his decree previously stayed. The debtor applied again for stay.

Held, that applications by a creditor are intended to be made with regard to his own debts and not with regard to the debts of third parties and a stay of execution of decrees by such third parties cannot be granted.

(1939) 2 M.L.J. 727 and (1940) 2 M.L.J. 923 and C.R.P. No. 2122 of 1939 [N.R.C. (1940) 2 M.L.J. 55] referred to and discussed.

V. Viyyanna for Petitioner.

V. Suryanarayana and *M. V. Nagaramayya* for Respondents.

K.S.

Abdur Rahman, J.
26th February, 1941.

Sivacharya Rajendra Mahaswami *v.* Kadaloor Veerabhadrayya and others.
S.A. No. 885 of 1937.

Religious office—Claim based on ancient custom—Essentials of validity—Constitution or succession of mutt—If can be altered by the head—Headship of mutt if can be partitioned—Right to hold office and collect offerings—If 'property'—Limitation Act, S. 28 and Art. 124—Applicability.

Plaintiff, the head of a mutt, filed a suit against the defendant for a permanent injunction restraining him from functioning as Charapattadhyaksha of the same mutt and from styling himself as such and going about collecting *Kanikais*, etc., from desciples of the mutt and from the pilgrims who gather on the Shree Sailam hill where the famous temple of God Siva is situated. The defence was (1) that the office had been in existence in the suit mutt since 1851, (2) that the defendant had been validly appointed to that office in accordance with the custom and usage of the mutt, (3) that, he also acquired the right to that office by ancient custom and by prescription, and (4) that the suit of the plaintiff was barred by limitation because to the knowledge of the plaintiff for over 12 years prior to the suit he had been functioning as Charapattadhyaksha.

Held, that (1) the office of the Charapattadhyaksha came into existence in 1851, *i.e.*, within living memory; therefore, the claim of the defendant based on customary usage cannot be supported. (1893) A.C. 104; 5 W.R.P.C. 69; 115 E.R. 19; (1867) 2 H.L. 59; 107 E.R. 554; 43 Cal. 707, referred to and relied on; (2) that it was not possible for a mahant to alter the constitution or succession of a mutt of which he was in charge, (3) that the headship of a mutt cannot be a matter of partition. The claim therefore of the defendant based on prescription must be negatived. (6 Bom. 298; 29 Mad. 293; 44 Mad. 205; 24 M.L.J. 75; 70 M.L.J. 424 were distinguished and held inapplicable on the ground that they were cases which related to trustees of temples where the office was to devolve hereditarily either on only one member or on all members of the family.) In the case of a mutt, the successor of the mutt has to be appointed in accordance with the rules prescribed by the founder or in their absence in accordance with the usage of the mutt; (3) that the suit however must be held to be barred by limitation. S. 28 and Art. 124 of the Limitation Act apply to the case. The term "property" in S. 28 has not been used in the sense of immoveable property alone. Rights such as a right to graze flocks of sheep in certain woods or a suit for 'dharmakartaship' of a pagoda came within the term 'property'. The right to hold the Charapattadhyaksha office with power to collect kanikais from disciples of the mutt is property' within the meaning of S. 28. The suit not having been brought within twelve years from the date of knowledge that defendant has been functioning as Charapattadhyaksha as required under Art. 124 it must fail. (1940) 2 M.L.J. 996 (F.B.), distinguished; 43 Mad. 253; 43 Mad. 665 and 37 Cal. 885, followed.

V. S. Narasimhachari and *Kasturi Seshagiri Rao* for Appellants.

A. C. Sampath Iyengar and *S. Krishnamachari* for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
27th February, 1941.

Karupanna Goundan *v.* Marutha Pillai.
C.R.P. No. 1206 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 8—*Explanation—Hindu joint family debt—Partition—Fresh document by a member not an executant of the original note—If renewal.*

On 2—3—1925 the defendant's father and brother executed a promissory note in renewal of a series of earlier ones. In a partition in the debtors' family the debt was allotted to the defendant. He thereafter executed the suit promissory note on 12—7—1932, discharging the prior note by his father and brother. In an application for scaling down,

Held, that the suit debt is not due from the same debtor as the first debt and cannot therefore be regarded as a renewal or inclusion in a fresh document of that debt.

K. S. Desikan and *K. Raman* for Petitioner.

S. Panchapagesa Sastri for Respondent.

K.S.

Venkataramana Rao, J.
3rd March, 1941.

The Madura Municipality *v.* Nataraja Pillai.
S.A. No. 594 of 1937.

Madras District Municipalities Act (V of 1920), *S.* 145—*Flush-out latrines—Erection by Municipality constituting private nuisance—Claim to restrain—Erection under statutory duty—If defence.*

A suit was filed against the Madura Municipality for an injunction restraining it from erecting a public flush-out latrine on the ground that it obstructed plaintiff's right of free access to the road from the back of his house and also prevented a full view of his house. The Municipality contended that the erection in question was authorised under S. 145 of the District Municipalities Act being one of their compulsory statutory duties even if it amounted to a private nuisance.

Held, that the erection of the public flush-out as it was found to amount to a nuisance cannot be taken to be authorised by S. 145 of the District Municipalities Act. 16 Ch. D. 449, applied. The difference between the terms of the local enactment and the English statutes should be regarded as immaterial for this purpose.

K. Rajah Aiyar and *C. S. Rama Rao Saheb* for Appellant.

A. Ramaswami Aiyar and *N. Sivaraj* for Respondent.

K.S.

F.B.

The Chief Justice, Mockett and Krishnaswami Aiyangar, JJ.
3rd March, 1941.

In the matter of P, a Pleader.
R.C. No. 12 of 1941.

Legal Practitioners' Act (XVIII of 1879), *S.* 32—*Failure of pleader to apply for renewal of his sanad till a few months after due date—Offence—Punishment.*

It is manifest that for a pleader to practise for ten months without renewing his sanad is a serious matter and the offence cannot be condoned. S. 32 of the Legal Practitioners' Act empowers the Court to impose a fine equal to ten times the amount of the stamp required for a certificate authorising him to practise. The duty is Rs. 25. In the circumstances the pleader was fined Rs. 75 and his sanad was directed to be renewed on payment of the fine and not before.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) in support of the Notice.

V. Subramanyam for Pleader.

K.S.

Happell, J.
4th March, 1941.

Sundararaja Mudaliar *v.* Krishnaswami Iyer and others.
C.R.P. No. 1091 of 1940.

Indian Succession Act (XXXIX of 1925), *S.* 381—*Succession certificate—Application for by son of deceased—Application by debtor to be impleaded*—Locus standi.

In an application by a son of a deceased person, for the grant of a succession certificate, a debtor to the estate of the deceased has no *locus standi* to be impleaded as a party. Section 381 of the Indian Succession Act, 1925, affords full indemnity to the debtor, on payment to the holder of the succession certificate.

Accordingly where an application was made for the grant of a succession certificate by a person claiming to be the legatee under the will of his deceased mother and entitled to the debt specified therein, the debtor who had not disputed the debt applied to the Court to be impleaded therein for the purpose of opposing the grant of the certificate to the petitioner disputing the genuineness of the will.

Held, that the debtor had no *locus standi* to apply.

T. R. Srinivasan for Petitioner.

S. Jagadisa Iyer and *G. R. Jagadisan* for Respondent.

K.S.

F.B.

The Chief Justice, Mockett and Krishnaswami Aiyangar, JJ.
6th March, 1941.

Kandasami Thambiran *v.* Vagesam Pillai.
A.S. No. 137 of 1938.

Specific Relief Act (I of 1877), *S.* 42, *Proviso—Suit for declaration of title to office of headship of mutt and for possession of the same—Prayer for possession of endowments of the mutt essential as consequential relief.*

K filed a suit against the present Pandarasannadhi of the Kunnakudi Mutt for a declaration that he was not lawfully appointed and prayed for possession of the office, injunction and other reliefs. But no prayer for possession of the properties of the endowments was included. On appeal, the High Court held following the decisions in 54 Mad. 1011 and 55 Mad. 549, that the suit was one in which the private right of the plaintiff to the office was in question and no sanction of the Hindu Religious Endowments Board was necessary for the maintainability of the suit. But the other question whether the suit as framed was barred under S. 42 of the Specific Relief Act was referred to a Full Bench in view of the conflicting decisions in 33 Mad. 452 and 47 M.L.J. 671.

Held, by the Full Bench, that the view in 33 Mad. 452, that a plaintiff who sues for a declaration of his right to the office is bound to sue for possession of the properties belonging to the endowment is correct on the ground that the claim to properties follows the claim to the office and relief to one could not be asked for without praying for the other. In the result the suit was held to be barred under the proviso to S. 42 of the Specific Relief Act.

33 Mad. 452, followed.

47 M.L.J. 671 and 28 Bom. 567, disapproved.

A. C. Sampath Iyengar and *S. Narasinga Rao* for Appellant.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for Respondent.

K.S.

The Chief Justice and Mockett, J.
7th March, 1941.

Pattu Achi *v.*
V. Rajagopala Pillai.
L.P.A. No. 17 of 1940.

Hindu Law—Adoption—Alienation by adoptive mother after death of first adopted son and before second adoption — Right of subsequently adopted son to recover the property from alienees.

A widow with authority from her husband adopted in 1891 *P* who died in 1907. In 1922 she made a partition with the nearest reversioner conveying to him a portion of the inherited estate. In 1926 she adopted the plaintiff who in 1934 filed the present suit to recover the properties conveyed to the reversioner in 1922.

Held, that (*i*) the plaintiff is to be regarded only as heir to the first adopted son and as such an heir inferior to the adoptive mother;

(*ii*) the restrictions on the powers of a widow or mother being the same the alienees in both cases would hold the property only so long as there was no adoption or re-marriage by the widow and the alienees could not successfully resist a suit by the adopted son to recover possession of the property alienated to him;

(*iii*) the plaintiff would be entitled to recover possession of the property from the alienee even during his adoptive mother's lifetime. 2 Mad. 99 at 101 (P.C.); 41 Mad. 855 at 859; 59 Mad. 1064 at 1077, followed. 49 Bom. 604, and Mayne's Hindu Law § 197, p. 267, commented upon. 39 Mad. 1085 and 48 Mad. 938, referred to. Case-law discussed.

K. Rajah Aiyar, K. Venkataramani and *V. Ramaswami* for Appellants.

T.M. Krishnaswami Aiyar and *C.A. Seshagiri Sastri* for Respondents.

K.S.

Burn and Lakshmana Rao, JJ.
7th March, 1941.

Srinivasa Iyengar *v.*
Balasubramania Edangapirandar.
C.R.P. No. 1667 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Dismissal of second appeal in July, 1938—Reservation of rights to get decree scaled down—Effect on right to get decree scaled down in trial Court.

While dismissing a second appeal in a suit on a promissory note in July, 1938 the Court noted at the end of the judgment at the appellant's request that nothing in the judgment would debar the debtor appellant from filing an application to the lower Court under S. 19 of Act IV of 1938, *see* (1939) 1 M.L.J. 68. The debtor then filed an application to the trial Court for sealing down the decree against him.

Held, that S. 19 of the Act was inapplicable to decrees passed after the Act came into force and that no rights could be deemed to have been reserved to the debtor at the time of the dismissal of his second appeal. In any event the reservation of such rights would be contrary to the provisions of the Act and would therefore be invalid. The decree cannot therefore be sealed down.

N. Rajagopala Aiyangar for Petitioner.

S. Muthia Mudaliar and *M. Krishna Bharati* for Respondent.

K.S.

Lakshmana Rao, J.
7th March, 1941.

Raghaviah and others *v.* Pitchayya.
Crl.R.C. No. 125 of 1941.

Code of Criminal Procedure (V of 1898), S. 350-A—Legality of trial held by Bench Magistrate when one of the Magistrates who signed the judgment of the Bench was not present at all the sittings of the Bench Court.

After the amendment of the Criminal Procedure Code and the enactment by the legislature of S. 350-A, a trial held by a Bench of Magistrates will not be vitiated merely because one of the Magistrates who signed the judgment was not present at some of the meetings of the Bench Court. Before a trial becomes illegal it should be shown that the Magistrate who signed the judgment did not hear all the evidence in the case. Mere absence of the Magistrate when arguments were addressed and when some accused were discharged and others were charged, would render the trial only irregular and not illegal.

Kasturi Seshagiri Rao for Petitioner.

The Public Prosecutor (*V.L.Ethiraj*) for the Crown.

K.S.

Abdur Rahman, J.
10*th March*, 1941.

Bhaghavathia Pillai *v.* Viravahu Pillai.
S.A. No. 293 of 1938.

Easement—Right of way conferred by sale deed—Right of way for scavengers—If can be claimed as easement of necessity—Right under sale deed dependent on circumstances existing at the time of transfer of property.

Defendant, a neighbour of the plaintiff was given a right of way along the front yard of the plaintiff's house under a sale relating to the plaintiff's house in 1908 and the right of taking back yard ashes and sewage water in his back yard was secured to the defendant under a sale deed to his predecessor-in-title in 1897. The defendant after his purchase in 1925 put up a pucca latrine in his back yard and claimed a right of way for the scavengers along the front yard of the plaintiff's house as an easement of necessity. The scavenger had been going along the plaintiff's front yard for about ten years and there was no other means of access to the defendant's premises by the scavenger.

Held, that the right of way originally given along the plaintiff's front yard was restricted and not general, that the circumstances existing at the time of the transfer of the house must alone be taken into account and that the defendant was not entitled to the right of way for his scavanger as an easement of necessity. 57 Bom. 186, distinguished. 58 Mad. 449=59 M.L.J. 956; 22 Bom.L.R. 1181; A.I.R. 1937 Cal. 661 and A.I.R. 1937 Pat. 589, referred to.

K. Venkateswaran for Appellant.

C. Srinivasan for Respondent.

K.S.

Mockett, J.
21st February, 1941.

Thandapani Chettiar
v. Vanderveen.
C.R.P. No. 1656 of 1940.

Indian Soldiers Litigation Act (IV of 1925), S. 11—Charge-man employed in cordite factory—If entitled to the benefits of the Act modifying the law of limitation.

The respondent was employed as chargeman in a cordite factory and more than three months after a court-sale of his properties in execution of a decree against him, he applied to have the sale set aside under O. 21, r. 89, C.P.Code and claimed the benefit of S. 11 of the Indian Soldiers Act of 1925 for extending the period of limitation for his application.

Held, that the respondent was not a soldier and hence the Act of 1925 had no application to him and the period of limitation cannot be extended.

K. Bhashyam Aiyangar and *T.R. Srinivasan* for Petitioner.

Pais, Lobo and *Alvares* for Respondent.

K.S.

Wadsworth, J.
25th February, 1941.

Govinda Mudali *v.* Subbaraya Iyer.
C.R.P. No. 1786 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 20 and 19—Joint family debtor—Consecutive applications by different coparceners—If maintainable.

Act IV of 1938 regards the family as a unit which may be represented by any member—the exception being the special provisions of S. 14 for dealing with the non-agriculturist coparcener. It cannot have been the intention of S. 19 to allow an indefinite number of coparceners to bring successive applications each asking for the same relief on behalf of the same coparcenary. An earlier application will bar a fresh application by a joint family judgment-debtor who was represented by the former applicant.

Decision of Newsam, J., in *Gopi Reddi* v. *Rama Reddi,* I.L.R. (1939) Mad. 530=(1939) 1 M.L.J. 888, approved.

C. S. Swaminathan for Petitioner.

P. G. Menon for Respondent.

K.S.

King and Patanjali Sastri, JJ
26th February, 1941.

Paramasivam (Receiver) *v.*
Chenchuramireddy.
A.S. No. 184 of 1938.

Provincial Insolvency Act (V of 1920), Ss. 38 and 39—Scheme for composition—Provision for some creditors giving up claim against others who were sureties—Non-consenting creditors—How far bound inter se *by the provision in the scheme.*

In a scheme for the composition of the insolvent's debts there was a provision that certain creditors should receive a larger dividend in pursuance of the settlement than the ordinary creditors as consideration for their giving up their claims against other creditors, the sureties of the debtor. In a suit for enforcing a debt by a creditor who did not consent to the scheme, against the surety, it was contended that the settlement in the insolvency was a bar to the suit and the only remedy of the creditor was to have appealed against the scheme.

Held, that the scheme being one imposing an obligation upon one creditor to give up his claim against another, S. 39 cannot possibly cover the case and the fact that the plaintiff did not consent to the scheme approved by the majority of creditors under S. 38 made the provision in the composition not binding upon him and therefore will not bar the suit.

V. Subramanyam for Appellant.

D. R. Krishna Rao for Respondent.

K.S.

N R C

The Chief Justice and Happell, J.
27th February, 1941.

Seetharama Chettiar *v* Sheik Abdul Rahiman Sahib
L.P.A. No. 22 of 1940.

Limitation Act (IX of 1908), *Art* 182 (2) *'Appeal'—Meaning.*

In an appeal arising out of an application filed in 1935 to execute a decree of 1929 on the question whether the application was barred by limitation it was contended by the decree-holder that his application was not barred as it was within three years from 1933 when an 'appeal' against an order dismissing the judgment-debtor's application to record satisfaction of the decree was dismissed.

Held, that the word 'appeal' in Art. 182 (2) of the Limitation Act would not mean any appeal the result of which may affect not the decree itself but only the decree-holder's right to execute it at a particular time and in particular circumstances, and that the application for execution was barred.

Decision of King, J., in (1940) 2 M.L.J. 371, affirmed.

K. Rajah Iyer for Appellant.

P. S. Narayanaswami Iyer for Respondent.

K.S.

King, J.
27th February, 1941.

Konda Reddi and others *v.* Lakshmamma.
A.A.A.O. No. 50 of 1938.

Practice—Decree against widow—Executing Court's power to construe the decree by reference to pleadings, etc.

In a suit against a widow on two promissory notes the plaint specifically stated "It is prayed that a decree may be passed enabling the plaintiff to recover the plaint amount and court costs together with subsequent interest upto the date of payment from out of the movable and immovable properties belonging to the late *S* (the defendant's husband) which are in the possession of the defendant". The decree was simply that "the defendant do pay" which on the face of it would only amount to a personal decree. In the execution of the decree,

Held, that the pleadings and judgment can be consulted in order that the decree may be properly interpreted.

10 Cal. 985, relied on.

The plaintiff claimed to proceed against the estate and the right must be deemed to have been given to the plaintiff by the judgment and decree.

E. Vinayaka Rao for Appellant.

Kasturi Seshagiri Rao for Respondent.

K.S.

The Chief Justice and Mockett, J.
7th March, 1941.

Ethirajulu Naidu *v.* Ranganatham Chetti and others.
C.M.P. No. 1411 of 1941.

Practice—Stay of execution pending application for special leave to appeal to the Privy Council—Power of High Court to grant.

Where a party after an unsuccessful application for leave to appeal to the Judicial Committee wishes to move for special leave, the High Court has in such circumstances power to grant a stay of execution.

Nanda Kishore Singh v. *Ram Gola Sahu*, I.L.R. 45 Cal. 955, approved.

A. Viswanatha Aiyar and *T. S. Muthuswami* for Petitioners.

A. Subramaniam for Respondents.

K.S.

Venkataramana Rao and Somayya, JJ.
11th March, 1941.

Ajaba Nateswaran *v.* Sri La Sri Vaidyalinga Pandarasannadhi.
A.S. No. 207 of 1939.

Madras Hindu Religious Endowments Act, S. 78—*"Adhinam"—If included in "Mutt".*

In a suit under S. 78 of the Hindu Religious Endowments Act (with the sanction of the H.R.E. Board) for the removal of the Adhinakartha from the Velakurchi Adhinam, Tinnevelly District, it was contended that the word 'Adhinam' was unknown to the Act and Hindu Religious Endowments Board could not give sanction to such a suit.

Held on appeal, that the word "Adhinam" is included in the word "Mutt" in the Act, and that the Board could give sanction under S. 78 in respect of such an institution.

A. V. Visvanatha Sastri and *R. Sundaralingam* for Appellant.

S. Ramachandra Aiyar and *R. Chakravarthi* for Respondent.

K.S.

Pandrang Row and King, JJ.
11th March, 1941.

Kunchithapadam Pillai v. Saraswathi Ammal.
C.M.A. No. 206 of 1939.

Limitation Act (IX of 1908), Art. 182 (5)—Scope—Starting point of limitation—Whether date of abatement or of dismissal of appeal.

The assignee of a decree-holder applied for execution which was ordered. An appeal was filed but the appellant died on March 28, 1933 and no application was made within 90 days to bring his legal representatives on record. The appeal was dismissed as having abated on September 17, 1935. On an execution petition filed on April 6, 1938,

Held, that the application was not barred as limitation under Art. 182 (5) began to run only from the date of the dismissal of the appeal the same being a final order within the meaning of the Art. 182 (5). 32 C.W.N. 887, followed.

R. Sundaralingam for Appellant.

K.P. Ramakrishna Aiyar for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
12th March, 1941.

Rajah of Venkatagiri v. Minor Sirigiri Ramanjulu Chetti minor by Irla Pulliah Chetty.
C.R.P. No. 1329 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 3 (iv) and 15 (4)—"Rent"—If includes "Jodi".

"Rent" as defined by S. 3 (iv) of Act IV of 1938 and for the purposes of that Act includes 'quit rent' 'jodi' 'kattubadi' 'porruppu' or the like payable to the land-holder in an estate as defined in the Madras Estates Land Act, 1908. A person liable to pay 'jodi' is therefore a tenant, and the property in respect of which such rent, has accrued is a 'holding'. S. 15 (4) is accordingly applicable to such 'jodi' as rent. In estates like Kalahasti and Venkatagiri the Zamindar can be held to be the land-holder of an inam village though the Inamdar himself may be also a land-holder.

P. V. Rajamannar and K. Subba Rao for Petitioner.

N. C. Subbayya for Respondent.

K.S.

The Chief Justice and Somayya, J.
13th March, 1941.

Ramalinga Iyer v. Jayalakshmi Ammal.
C.R.P. No. 162 of 1940.

Civil Procedure Code (V of 1908), S. 20—Wife's suit for maintenance and recovery of stridhan, etc., against her husband and father-in-law—Place of suing—Common law rule that debtor should seek the creditor and pay him where he resided—Applicability—Contract Act, S. 49.

The plaintiff's marriage took place at Negapatam and owing to the illtreatment by her husband at Vellore where they were last residing she re-

turned to her father's place at Palghat. Her father-in-law was residing at Mayavaram. She filed a suit in the Court of the Subordinate Judge, Palghat against her husband for maintenance and against her father-in-law for the return of her properties alleged to have been entrusted to him at the time of marriage. On the question of jurisdiction it was contended that in the absence of a contract to the contrary the English Common Law rule that the debtor must seek the creditor applied and therefore the Palghat Court had jurisdiction.

Held, that the Palghat Court had no jurisdiction, because the cause of action for either the right to recover maintenance or for the re-delivery of the entrusted properties, (return of which must have been contemplated at the family residence at Mayavaram or at the place where the husband resided) did not arise at Palghat.

5 Rang. 451=53 M.L.J. 25 (P.C.); 31 Mad. 223 and (1940) 1 M.L.J. 558, discussed.

M. Ranganatha Sastri for Petitioner.

Ch. Raghava Rao for Respondent.

K.S.

[F.B.]

The Chief Justice, Mockett and Krishnaswami Aiyangar, JJ.
17th March, 1941.

In re Adhi Lakshmi Ammal.
Cr.R.P. Nos. 1052 of 1940, etc.

Madras Prohibition Act (X of 1937), S. 4 (1) (a)—Validity—Repugnancy to Abkari Act and Dangerous Drugs Rules (1930)—Effect.

S. 4 (1) (a) of the Madras Prohibition Act is entirely repugnant to the Hemp and Drug Rules because it prohibits a person from possessing any *ganja* whatsoever. So far as possession of *ganja* or any other dangerous drug is concerned the provision is *ultra vires* the Madras Legislature as it relates to a subject in the concurrent list under S. 107 of the Government of India Act 1935 and the impugned Act was not reserved for the consideration of the Governor-General.

M. Natesan and *A.N. Veeraraghavan* for Petitioners.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *A. S. Sivakaminathan* for the Public Prosecutor, for the Crown.

K.S.

Wadsworth, J.
18th March, 1941.

Seethalakshmi *v.* Nagaswami Aiyar.
C.R.P. No. 614 of 1938.

Madras Agriculturists' Relief Act (IV of 1938), S. 3 (iii)—"debtor"—Meaning—Heir of the maker of a promissory note—Whether "debtor".

Where a decree is obtained against the daughter of the maker of a promissory note, making the daughter liable for the debt to the extent of the assets of her father in her hands as heir, the daughter is a "debtor" entitled to the benefits of the Act.

C.R.P. No. 1694 of 1938, relied on. [In C.R.P. No. 1694 of 1938, His Lordship *Wadsworth, J.* observed as follows: "In view of *Periannan v. Sellappa,* (1938) 2 M.L.J. 1068 and the many decisions flowing from it, it cannot be contended that for the purpose of Act IV of 1938, it is only the actual borrower who can claim the benefits of the Act. Clearly a son who is made liable for his father's debts to the extent of the family properties in his hands is under a liability which can be scaled down under the Act".]

T.P. Gopalakrishna Aiyar for Petitioner.

Respondent not represented.

K.S.

Krishnaswami Aiyangar, J.

Tulasidas Murarji Sait *v.* P.S. Sethuramaswami Iyer and others. **C.R.P. Nos. 1224 and 1225 of 1940.**

Civil Procedure Code (V of 1908), *O.* 23, *r.* 1—*Withdrawal of one of several plaintiffs without consent of others—When permissible.*

A suit was instituted by plaintiffs 1 and 2 along with the 3rd plaintiff (petitioner) for the specific performance of a contract of reconveyance entered into between the first two plaintiffs and the defendant. The 3rd plaintiff was the financier of the first two plaintiffs. Disputes arose between the 3rd plaintiff and the other plaintiffs and the former sought to withdraw from the suit unconditionally under O. 23, r. 1, C.P.Code.

Held, that one of several plaintiffs can withdraw from the suit without the consent of the others in cases where no prejudice will be caused to the latter in the further conduct of the suit. 29 Bom.L.R. 299 and 9 Cal.L.R. 332, followed. I L.R. 57 Mad. 299, explained.

D. Ramaswami Aiyangar and *T. P. Kannabhiran* for Petitioner.

S. Panchapagesa Sastri and *P.S. Ramachandran* for Respondents.

K.S.

Abdur Rahman, J.
19th February, 1941.

Garai Gowder *v.* Rajammal. **S.A. No. 787 of 1938.**

Hindu Law — Widow — Maintenance — Provision made by father-in-law—Death of father of widow and loss of material help from him—If ground for enhancement.

A father-in-law had out of his separate property provided by a deed for the maintenance of his daughter-in-law at Rs. 95 per annum. After the father-in-law's death a suit was filed by the widow alleging that the amount was fixed " without any consideration to her needs and circumstances and the properties of her husband's family '' as she was then living with her father who was in affluent circumstances and in a position to maintain her in comfort and according to her status, but that on account of the subsequent demise of her father and her inability to live with her brother she found the amount of maintenance fixed by the deed too meagre to live upon. She also alleged that the income of the family had increased from Rs. 3,000 to Rs. 5,000 per annum. She claimed enhancement in the rate of maintenance.

Held, that the change in the plaintiff's circumstances caused by her father's death can be taken into account in considering the question of enhancement of the widow's maintenance allowance.

T.R. Ramabhadrachari for Appellant.

N. Somasundaram for Respondent.

K.S.

Wadsworth, J.
21st February, 1941.

Srinivasa Aiyangar *v.* Kumaraswami Naicker. **C.R.P. No. 1592 of 1939.**

Madras Agriculturists' Relief Act (IV of 1938), *S.* 8—*Explanation—Joint family debt undertaken to be discharged and fresh notes executed by three out of the six coparceners at a partition—If renewal.*

A family debt of 1917 was the subject of an agreement at partition whereby three only of the six coparceners took over the liability in unequal shares and executed promissory notes to the creditor for the amount of those shares.

Held, when at a partition the joint liability was terminated and new and individual liabilities were created the identity of the debt was destroy-

ed and it cannot be said that the original debt was renewed or included in a fresh document between the same parties. The debt must therefore be treated as one originating at the date of the later notes sued on.

B. Ramasubbu Aiyar for Petitioner.

K.S.

The Chief Justice and Happell, J.
20th February, 1941.

Zamindar of Tuni *v.* Tirupatayya.
L.P.A. No. 37 of 1939.

Madras Local Boards Act (XIV of 1920), *Ss.* 88 *and* 89—*Suit for recovery of cess—Limitation.*

When a landholder purports to exercise powers under the Madras Estates Land Act extended by the operation of S. 89 of the Madras Local Boards Act for the recovery of cess from a person who is not a ryot but may be treated as such for the special purpose, he must exercise the powers subject to the procedure, limitations and restrictions contained in the Madras Estates Land Act. The power conferred under S. 89 of the Local Boards Act includes a power to file a suit against an under-tenure-holder for a cess rent and is not merely confined to the use of the same procedure and such a suit will be governed by Art. 120 of the Limitation Act. There cannot be any difference in principle when distraint is levied or property is sold summarily and when a suit is brought under S. 77 of the Madras Estates Land Act

Decision of *Wadsworth, J.*, affirmed.

P Somasundaram for Appellant.

V. Viyanna for Respondent.

K.S.

Somayya, J.
28th February, 1941.

Palanisami Pillai *v.* Raghavachariar.
C.R.P. No. 585 of 1939.

Practice — Execution — Jurisdiction — Decree in suit for more than Rs. 100—*Presiding officer at time of execution application not having jurisdiction beyond Rs.* 100—*"Proper Court" to entertain execution application.*

A decree sought to be executed was passed in a small cause suit in which the claim was for over Rs. 100 when the presiding officer had small cause jurisdiction up to Rs. 800. At the time of the execution application the officer who presided over the Court had no small cause jurisdiction beyond Rs. 100. On the question whether the application was presented to the "proper Court",

Held, that the Court which passed the decree had power to execute the decree notwithstanding the provisions of S. 37, C.P Code and therefore the application was made to the proper Court.

A.I.R. 1938 Cal. 684 and 39 I.C. 63, followed.

K.R. Rangaswami Aiyangar for Petitioner.

A. Srirangachariar for Respondent.

K.S.

Venkataramana Rao, J.
3rd March, 1941.

Sitayya *v.* Gangaraju.
S.A. No. 303 of 1938.

Practice—Service of summons—Declaration of sufficiency—Form of order.

An order that "defendants refused summons in the ordinary course as well as by post. Absent, *ex parte*," must be deemed to be a declaration to the effect that the service is sufficient.

B. C. Seshachala Aiyar for Appellant.

V. Viyanna for Respondent.

K.S.

[F.B.]

The Chief Justice, Mockett and Krishnaswami Aiyangar, JJ.
4th March, 1941.

Bhagavantulayya Dhora and others *v.* Venkadhora and others.
L.P.A. No. 8 of 1940.

Mortgage—Undertaking to pay "by 10—9—1928"*—Tender in June,* 1927, *of an amount short by Rs.* 4 *for principal and interest—Refusal of tender by mortgagee on the ground that mortgage could not be redeemed before* 10—9—1928*—Whether mortgagee could subsequently object to the amount of the tender.*

There was a covenant in a mortgage as follows: " We shall pay all the principal and interest payable under this document by 10—9—1928''. The mortgagor tendered in June, 1927, the amount of Rs. 760 which was short by Rs. 4 of the exact amount due on that date and the mortgagee refused the tender on the ground that the mortgage could not be redeemed before 10—9—1928.

Held, that (1) the mortgagor was entitled to redeem on or before 10—9—1928. Case-law reviewed;

(2) Where a tender of an amount towards a mortgage was refused not because the amount tendered was short by Rs. 4 but because the mortgagee considered that he was entitled to wait until a much later day, *viz.*, 10—9—1928, the refusal of the tender on that ground waived any objection that the mortgagee may have had to the amount being short. It was not open to him to raise the question of the amount of the tender or ask for the application of the *de minimis non curat lex* rule.

V. Govindarajachari for Appellant.

G. Chandrasekara Sastri for Respondent.

K.S.

Pandrang Row, J.
7th March, 1941.

Subbiah Naidu *v.* Parvathathachi.
C.R.P. No. 971 of 1939.

Limitation Act (IX of 1908), *Arts.* 49 *and* 145*—Applicability.*

The plaintiff sued to recover a certain jewel or its value, in pursuance of a decision of the High Court in revision in an earlier suit filed on a promissory note by the defendant against the plaintiff. In the earlier suit the High Court in revision had decreed the claim based on the promissory note and had stated that the plea of the defendant in that suit about a jewel which he had kept with the plaintiff in that suit must be agitated in a fresh suit if necessary. The present suit was thereupon filed. On the question of limitation,

Held, that the Art. 49 is not applicable and the suit must be deemed to be one to which Art. 145 applies and the suit is within time.

S. Panchapagesa Sastri and *K.R. Krishnaswami* for Petitioner.

K.S. Champakesa Aiyangar and *K.C. Srinivasan* for Respondents.

K.S.

The Chief Justice and Somayya, J.
12th March, 1941.

Krishna Reddy *v.* Satyam and others.
C.M.P. No. 235 of 1941.

Madras Hereditary Village Offices Act (III of 1895), *S.* 14 (1)*—Suit for recovery of office and emoluments—Suit filed more than three years from date of cause of action—Jurisdiction of Revenue Court to entertain.*

In a suit for the recovery of an office and its emoluments filed before the Collector, the question arose whether mesne profits can be claimed for more than three years before suit.

Held, that if the cause of action accrued more than three years before the presentation of the plaint the Collector has no power to grant the plaintiff a decree for mesne profits for a period greater than three years.

Kasturi Seshagiri Rao for *D. Suryaprakasa Rao* for Petitioner.

G. Chandrasekhara Sastri for Respondents.

K.S.

Venkataramana Rao, J.
14th March, 1941.

Madelimsetti Ramiah *v.* The Liquidator, Bollanka Co-operative Credit Society, Ramachandrapur.
S.A. No. 269 of 1940.

Madras Co-operative Societies Act (VI of 1932), S. 48 and r. 22 (17-c)—Property brought to sale by liquidator of co-operative society in execution of a decree obtained by the society—Person failing in his claim petition—Prior leave of Registrar—If necessary for filing a suit to establish his right to the property.

Certain properties having been brought to sale by the liquidator of a co-operative society in execution of a decree obtained by the society, a claim petition in respect of those properties proved unsuccessful. In a suit filed by the claimant for establishing his right to the property sought to be sold it was contended that the suit was not maintainable without the prior leave of the Registrar.

Held, that such a suit having been provided for under r. 22 (17) (c) of the rules framed by the Provincial Government in exercise of its power under S. 65 of the Co-operative Societies Act, which makes such rules part of the statute, the suit must be deemed to have been expressly provided for by the Act itself and therefore maintainable, and that the prohibition under S. 48 affects only suits not expressly provided for.

K. Bhimasankaram for Appellant.

A. Lakshmayya for Respondent.

K.S.

Mockett, J.
14th March, 1941.

Sankaralingam Pillai *v* Sonaiya Pillai
C.R.P. No. 728 of 1938.

Assignment of usufructuary mortgage for consideration—Dispossession of assignee by prior mortgagee—Right of assignee to recover money as consideration which had failed.

The defendant on 25—1—1936 assigned a usufructuary mortgage to the plaintiff who paid in return Rs. 100. In October, 1936 the plaintiff was dispossessed by another mortgagee of whose existence he did not know. There was also an indemnity in the assignment in the following terms: "I affirm that these properties have not been included in any other incumbrance: if it be found to be included in any other encumbrance, I will myself discharge them". In a suit against the defendant for the recovery of the Rs. 100,

Held, that the indemnity would cover also incumbrances other than those made by the defendant himself and in any event the plaintiff was entitled to recover the amount as a consideration which had wholly failed as the defendant had no right to assign the mortgage.

K. V. Srinivasa Iyer for Petitioner.

K. S. Desikan for Respondent.

K.S.

Wadsworth, J.
17*th March*, 1941.

P. Ramamurthi, Pantulu *v.* Sri Sri Sri Lakshminarayana Harichandra Jagaddaveva Raja Bahadur.
C.R.P. No. 2169 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 15 *and* 19—*Joint and several liability of agraharamdars to pay* kattubadi—*Purchaser of a defined portion of the agraharam.*

The petitioner, a purchaser of a defined portion of an agraharam, was one of the many judgment-debtors under a decree dated 28—3—1925 for *kattubadi* payable to the Zamindar. It was contended on behalf of the petitioner that his liability was only proportionate to the share which he had purchased and that he was entitled to the benefit of S. 15 of the Act by depositing his proportionate share of the *kattubadi* for faslis 1346 and 1347.

Held, that the decree is joint and several imposing the liability for the whole of the arrears of *kattubadi* on all the defendants. The extent of the Court's powers under the Act in amending decrees is narrowly defined and it cannot be extended to the correction of decrees which appear to be erroneous in other respects. If the petitioner wants to get his liability under the decree scaled down, he must do so on the basis of the decree as it stands by depositing the two faslis' rent for the whole of the holding for the arrears on which he has been held jointly and severally liable.

A. Dorairaj for Petitioner.

G. Chandrasekhara Sastri for Respondent.

K.S.

Wadsworth, J.
17*th March*, 1941.

Nijamohideen Rowther, Petitioner.
C.M.P. No. 1405 of 1941.

Civil Procedure Code (V of 1908), *O.* 22, *r.* 4, *sub-r.* (4)—*Judgment passed in ignorance of the fact that one of the parties was dead—If can be validated subsequently.*

An order against a party who is dead is a nullity. It cannot be held that a judgment passed in ignorance of the fact that one of the parties was dead can bind the dead party merely by force of a subsequent order allowing the appeal to be treated as if it had been decided advisedly in the absence of his legal representatives. O. 22, r. 4, sub-r. (4) cannot have the effect of an *expost facto* validation of judicial proceedings passed in the absence of legal representatives of the dead party.

K. Venugopala Aiyangar for Petitioner.

K.S.

[F.B.]
The Chief Justice, Somayya and Patanjali Sastri, JJ.
18*th March*, 1941.

S.S.S. Chokkalingam Chettiar *v.* The Commissioner of Income-tax, Madras.
O.P. No. 204 of 1940.

Income-tax—Assessee having two mortgages over same property—Suit for principal and interest of only first mortgage, as security was barely sufficient for that, giving up claim in respect of the other mortgage—Right to deduction for bad debt.

The assessee had two mortgages in his favour, one for Rs. 40,000 and another for Rs. 10,850 in respect of the same property. In the year of account the assessee filed a suit for the principal and a fraction of the

interest due on the first mortgage giving up the claim on the second as the security was insufficient even for the first mortgage. The assessee claimed a deduction of Rs. 10,850 as bad debt. It was contended on behalf of the Crown that the two mortgages were in substance one transaction and the suit must be deemed to be one for the recovery of the principal due under both the mortgages and that the claim for deduction was premature.

Held, negativing the contention, that the assessee had in truth and in fact incurred a loss of capital of Rs. 10,850 which he was entitled to have deducted as a bad debt. The "substance of the matter" as distinguished from the strict legal position cannot be regarded in revenue cases.

K Krishnaswami Aiyangar and *T P. Gopalakrishna Aiyar* for Assessee.

K.V. Sesha Aiyangar for the Commissioner of Income-tax.

K.S.

[F.B.]
The Chief Justice, Somayya and Patanjali Sastri, JJ.
18th March, 1941.

Jamal Muhammad Sahib *v.* The Commissioner of Income-tax, Madras.
O.P. No. 308 of 1940.

Income-tax Act (XI of 1922), S. 4, Cl. 3 (1)—Wakf—Provision for maintenance of the needy descendants of the donor—If for a charitable purpose and so exempt from assessment.

A wakf *inter alia* provided for the maintenance and upkeep of such descendants of the donor in the male line, who might happen to be in poor and needy circumstances and unable to maintain themselves. The trustee of the wakf claimed exemption from assessment for the whole of the wakf property. The income-tax authorities allowed exemption for the share of income set apart for general charitable purposes, but declined to exempt the income allotted for the maintenance of the descendants of the donor. On a reference to the High Court,

Held, that in deciding whether there was a provision for charitable purposes the law to be applied was only the English law and according to the English law the provision for maintenance of the poor and needy descendants of the donor could not be construed to be for a charitable purpose as they were not of general public utility within the meaning of the Income-tax Act. Their Lordships answered the reference in favour of the Income-tax authorities.

B. Pocker and *K.T.M. Ahmed Ibrahim* for Assessee.

K.V. Sesha Aiyangar for the Income-tax Commissioner.

K.S.

Pandrang Row and King, JJ.
19th March, 1941.

Kandasami Chettiar and others *v.* Gokuldas Madanji & Co.
C.M.A. No. 342 of 1939.

Limitation Act (IX of 1908), Art. 182 (5)—Decree transferred in August, 1932, to Bombay High Court for execution—Fresh application in February, 1935, to Court which passed the decree again for transmission to Bombay—Return of application on the ground that decree had not been received from Bombay—Re-presentation of same application in March 1937—If in time.

A decree was obtained in November, 1925 in the Sub-Court, Ramnad and an order transmitting the decree to the High Court, Bombay for execution was passed in August, 1932. In February, 1935 the decree-holder

again applied to the Ramnad Sub-Court for transmission of the decree to the Bombay High Court for execution. The Ramnad Court returned that application with an order that the decree had not been received from the Bombay High Court. The decree-holder re-presented the application in March, 1937.

Held, that the order of the Ramnad Sub-Court in February, 1935 was itself a final order as nothing more had to be done by the decree-holder and the case was different from the returning of applications for remedying defects. Even though the transferee Court had not sent the decree copy the parent Court had jurisdiction to execute its decree and the application in February, 1935 having been made to the proper Court its representation was not barred by limitation.

K.S. Ramamurthy for Appellant.

T.K. Subramania Pillai for Respondent.

K.S.

Wadsworth, J.
20th March, 1941.

Sri Rajah Velugoti Venkatarajagopala Krishna Yachendra Bahadur Varu *v.* Kuram Venkataseshacharlu.
C.R.P. No. 1705 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 15 *and* 19—*Scope.*

Where a decree was passed by a Civil Court for payment of rent due to the landholder for Faslis 1340 to 1345 S. 15 of the Madras Agriculturists' Relief Act does not entitle the Collector to entertain an application for relief under that section by the tenant. S. 19 of the Act no doubt applies expressly to cases of decrees passed for repayment of a debt. But on the analogy of S 19 the Court has inherent power to apply the procedure prescribed by S. 19 to cases where a landholder obtains a decree for rent against the tenant. Under the guise of a scaling down application under S. 15 of the Act the tenant-judgment-debtor cannot circumvent the decree passed by a Civil Court. He must apply first under S. 19 to the Court which passed the decree and after getting the decree amended only he can obtain relief under S. 15 of the Act.

P. V. Rajamannar and *K. Subba Rao* for Petitioner.

Kasturi Seshagiri Rao for Respondent.

K.S.

Wadsworth, J.
21st March, 1941.

Narayanan Nambudripad *v.* Achuthan Nair.
C.R.P. Nos. 1638 and 1835 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 3, *Proviso D*—*Construction.*

A jenmi paying less than Rs. 500 as land revenue on his jenmam lands, but paying more than that amount in his capacity as a kanamdar of a ryotwari pattadar could not be an agriculturist under proviso D to S. 3 of Act IV of 1938.

Decision of *King, J.*, in (1940) 2 M.L.J. 934, followed.

K. Kuttikrishna Menon and *D. H. Nambudripad* for Petitioners.

P. Govinda Menon for Respondent.

K.S.

Wadsworth, J.
21st March, 1941.

Sri Rajah Sobhanadri Appa Row Bahadur, Zamindar of Telaprolu *v.* Inuganti Venkatappayya Rao Bahadur.
C.R.P No. 2042 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 20—*Summary order in stay application deciding that applicant was agriculturist—How far* res judicata.

Plaintiff obtained in 1936 a decree for recovery of *kattubadi* against two mokhasadars. One of them applied under S. 20 of Act IV of 1938 before the District Munsif for stay of execution on the ground that by reason of a partition between the defendants the *kattubadi* payable by him became less than Rs. 100 and that therefore he was entitled to claim relief under the Act as an agriculturist and he then applied to the Sub-Collector for wiping off the decree debt by depositing in Court the *kattubadi* for fasli 1347 and the Sub-Collector passed an order in his favour under S. 15 (4) of the Act holding that he was bound by the decision of the Munsif under S. 20 that the debtor was an agriculturist. In revision,

Held, (*i*) that the order passed under S. 20 being of a summary nature was not *res judicata* in an application filed under S. 19 and an independent inquiry should be made as to whether the debtor was an agriculturist within the meaning of S. 19.

(*ii*) The proper Court to which an application under S. 19 should be made was the Civil Court which passed the decree and not the Sub-Collector's Court.

K. Umamaheswaran for Petitioner.

B. V. Ramanarasu for *V. Govindarajachari* for Respondent.

K.S.

The Chief Justice and Somayya, J.
21st March, 1941.

Sri Rajah Velugoti Venkatarajagopala Krishna Yechendra Bahadur Varu *v.* The District Collector, Nellore.
C.M.P. Nos. 6592 and 6593 of 1940.

Madras Estates Land Act (I of 1908), *S.* 186 (1) (a)—*Not applicable to* inams *excluded from the estate.*

In a petition for the issue of a *writ of certiorari* to quash the orders of the District Collector, Nellore, dismissing the petitioner's applications to grant certificates under S. 186 (1) (*a*) of the Madras Estates Land Act, for acquiring lands in the possession of minor *inamdars,*

Held, that S. 186 (1) (*a*) only applied to cases where a landholder of an estate desired to acquire any land which was part of an estate. Where the *inams* in question were pre-settlement *inams* enfranchised by Government and excluded from the estate the applications under S. 186 (1) (*a*) would not be maintainable.

P. V. Rajamannar, K. Subba Rao and *C.A. Vaidyalingam* for Appellants.

The Government Pleader (*K. Kuttikrishna Menon*), *K. Umamaheswaran* and *N.C. Subbaiyya* for Respondents.

K.S.

The Chief Justice and Somayya, J.
12th March, 1941.

Satyanarayana *v.* Anjareddi.
C.R.P. No. 832 of 1938.

Civil Procedure Code (*V of* 1908), *S.* 95—'*Plaintiff*', *if includes next friend of minor plaintiff.*

The Court has power to award against a 'plaintiff' reasonable compensation to the defendant for obtaining an order of arrest, attachment or temporary injunction under S. 94, C.P.Code, on insufficient grounds, or if it is found that there was no reasonable or probable ground for the institution of the suit. But where the suit is filed by the next friend of a minor plaintiff, the word 'plaintiff' in S. 95 cannot be read as including the next friend. The Court has no jurisdiction to order a next friend to pay compensation under S. 95. The injured party however is not prevented from instituting a suit to recover from the next friend compensation should he wish to do so.

P. Somasundaram and *P. Suryanarayana* for Petitioners.

A. Lakshmayya for Respondent.

K.S.

Pandrang Row and King, JJ.
14th March, 1941.

Ramachandra Reddiar *v.* Adilakshmi Ammal.
A.A.O. No. 517 of 1938.

Practice — Decree merely rectifying an earlier decree—Executability.

A decree made in a suit which was one merely to rectify an earlier decree, by including certain properties which had been left out in such earlier decree, is not capable of execution though the decree in its rectified form has been reproduced in the later decree, especially where the original decree itself has been rectified as directed in the later decree.

S. Panchapagesa Sastri and *K.R. Krishnaswami Aiyar* for Appellant.
lant.

M. S. Venkatarama Aiyar for Respondent.

K.S.

Pandrang Row, J.
14th March, 1941.

Seshamma *v.* Suramma and others.
C.R.P. No. 4 of 1940.

Court-Fees Act (*VII of* 1870), *Sch.* II, *Art.* 17 (b)—*Applicability—Suit for declaration of plaintiff's title to office of archaka, for delivery of the office and for injunction restraining defendants—Plaintiff's rights as holder—Emoluments attached to office—Whether makes the suit capable of valuation.*

A suit was filed for a declaration of the plaintiff's title to the office of archaka in a certain temple, for delivery of the said office to him and for an injunction restraining the defendants from interfering with the plaintiff's rights as office holder. The office of archaka carried with it certain emoluments. The lower Court ordered the plaintiff to carry out certain amendments to the plaint and pay an additional court-fee on the ground that as the office carried with it certain emoluments the right to the office cannot be regarded as incapable of valuation. On revision,

Held, that the court-fee payable on a plaint is to be determined with reference to the plaint as it stands. Any objection to the frame of the suit is not to be taken at the time of determining whether the court-fee paid on the plaint as it stands is correct or not. It may be, the plaint as framed for a mere declaration of right to office is not maintainable without a prayer for possession of the emoluments attached to the office. But if the plaintiff is prepared to take the risk there is no reason why he should be asked to amend the plaint and pay additional court-fee.

N R C

It cannot be said that merely because there are some emoluments attached to an office the claim for declaration of one's right to that office or for possession of that office is capable of valuation.

Karupanna Nadar v. *Mathalai Karuppa Nadar,* 1939 M.W.N. 720, applied.

T. Satyanarayana for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for the Government.

Respondents not represented.

K.S.

Wadsworth, J.
18th March, 1941.

Malyala Subba Rao *v.* Maharaja of Pithapuram.
C.R.P. Nos. 1157 of 1940 etc.

Practice — Party set ex parte — *Right to appear at later stage.*

The procedure known as '*setting ex parte*' is nothing more than a convenient method of indicating on the record that the party absent is not contesting and that the proceedings are to go on in his absence. It is open to him to make an appearance at a later stage provided that he is not in contempt for non-payment of costs or other penalty ordered, and to conduct his defence from that stage. But he has not the right when he has deliberately defaulted in doing what he was required to do and when the proceedings have gone on in his absence by reason of that default, to put the clock back and have the proceedings repeated with effect from the date of his default. On payment of the costs ordered he must be allowed to contest the proceedings from that stage.

V. Parthasarathi for Petitioner.

Ch. Raghava Rao for Respondents.

K.S.

Wadsworth, J.
20th March, 1941.

Markendeswaraswamy *v.* Satiraju.
C.R.P. No. 1838 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 20—*Scope.*

Under S. 20 of Act IV of 1938 the Court has to be satisfied that the applicant is entitled to the benefit of the Act. If on the materials adduced the Court is not so satisfied, the dismissal of the application would be the correct order.

R. Venkata Rao for Petitioner.

V. V. Chowdary, N. Kotiswara Rao and *A. Venkataswami* for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
24th March, 1941.

Venkataratnam, Appellant.
S.R. Nos. 33204, etc. of 1940.

Madras Agriculturists' Relief Act (*IV of* 1938), *Rules under—R.* 9—*Court-fee payable on appeals against orders under r.* 9—*Court-Fees Act* (*VII of* 1870), *Sch. II, Art.* 11—*Applicability.*

The proper Article of the Court-Fees Act to apply to appeals against orders under r. 9 of the rules framed under Madras Act IV of 1938 (which provides for an application either by the debtor or by the creditor for a declaration as to the amount of the debt due)—is Art. 11 of Schedule II and the court-fee payable will be Rs. 2.

N. Narasimham, A. Lakshmayya, Y. Suryanarayana and V. Rangachari for Appellants.

The Government Pleader for Government.

K.S.

The Chief Justice and Somayya, J.
24th March, 1941.

In re Syed Gaffar Sahib.
Crl.R.C. No. 273 of 1941 and
Crl.R.P. No. 259 of 1941.

Madras Prohibition Act (*X of* 1937)—*How far* ultra vires *the Provincial Legislature.*

In so far as the Prohibition Act is concerned with the possession of arrack manufactured in the Madras Presidency, there being no question of any import or export, the Provincial Legislature has the power to prohibit such possession. Therefore where a person has been found in possession of such liquor in the prohibited area, his conviction is lawful.

T. S. Venkataraman and *G. Venkatarama Sastri* for Petitioner.

K.S.

Wadsworth and Patanjali Sastri, JJ.
24th March, 1941.

Km. Kr. Km. Kuppan
Chetty *v.* Kaliammal.
A.S. No. 77 of 1941.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 8—*Mortgage by* A *to* B—*Purchase of properties by* B *from* C *and assignment of mortgages to* C *towards sale price*—C *assigning his rights to* D—*Suit by D against the heirs of* A *and alternatively against the heirs of* B—*Decree against* B'*s heirs only on the basis of covenants in the assignment deeds*—*Application by B's heir for scaling down*—*Nature of liability.*

A executed two mortgages for Rs. 2,000 and Rs. 1,000 respectively, in favour of *B* in 1921 and 1922. In 1928, *B* purchased certain properties from *C* and for a portion of the sale price assigned the mortgages executed by *A*, and also gave a covenant for indemnity. In 1935 *D*, an assignee from *C*, brought a suit against the heirs of *A* on the mortgages and alternatively against the heirs of *B* on the basis of the covenants. The suit as on the mortgages was dismissed but a decree was passed against the heirs of *B* for the amount which represented the balance of sale price for which the mortgages were assigned. In an application by one of the heirs of *B* for scaling down the decree debt,

Held, that the liability of the heirs of *B* could not be traced to the mortgages by *A*, but only to the assignment by *B*; and that the basis for scaling down the decree should not be the principal of the original mortgages by *A* but the amount for which the assignments were made by *B*.

R. Desikan for Appellant.

S. V. Venugopalachari for *N. Sivaramakrishna Aiyar* for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
25th March, 1941.

Santhappa *v.* Sowrappa
Holiappa Bulla
C.M.A. Nos. 424 and 425 of 1940.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 19—*Decree of Bombay Province transferred to Court in Madras Presidency for execution*—*Not liable to be scaled down.*

A decree passed by a Court in the Bombay Presidency transferred for execution to a Court in this province is not liable to be scaled down under Act IV of 1938. Proceedings under the Act for scaling down decree debts are not proceedings in execution under S. 47 of the C.P.Code.

B. Sitarama Rao and *Kasturi Seshagiri Rao* for Appellants.

V. S. Narasimhachar and *N. Appu Rao* for Respondent.

K.S.

Pandrang Row and King, JJ.
25th March, 1941.

Sivalingam Chettiar *v.* Subramanyam Chettiar and others.
C.M.A. No. 540 of 1938.

Civil Procedure Code (*V of* 1908), *O.* 21, *r.* 90—*Creditor who had no order of attachment in his favour—Whether and when entitled to apply under O.* 21, *r.* 90.

A person who was the creditor of a judgment-debtor whose property has been sold in execution of another decree could apply under O. 21, r. 90 of the Civil Procedure Code although he did not obtain any order for attachment before judgment, provided he could prove to the satisfaction of the Court that his interests were adversely affected by the sale in question. On the evidence, it having been found that although there were other properties of the debtor besides those sold in execution there were also other creditors with large claims,

Held, that if the properties had been sold in execution for an undervalue the pecuniary interests of the applicant creditor would be adversely affected and therefore he could come in by an application under O. 21, r. 90, C.P.Code, to set aside the sale.

C.S. Venkatachariar and *D. Ramaswami Aiyangar* for Appellant.

K. Bhashyam Aiyangar and *P.J. Kuppanna Rao* for Respondent.

K.S.

[F.B.]
The Chief Justice, Somayya and Patanjali Sastri, JJ.
26th March, 1941.

The National Cycle Importing Co. by Proprietor Amritlal Bhaichand Shaw *v.* The Commissioner of Income-tax, Madras.
O.P. No. 24 of 1941.

Income-tax Act (*XI of* 1922), *S.* 26 (2), *Proviso—Applicability.*

A firm carried on business with three partners up to the end of the samvat year 1994 (year ending with 23—10—1938). On 24—10—1938 two of the partners went out of the firm leaving the remaining partner as its sole proprietor. For the assessment year 1939-1940 (for accounting year samvat 1994), the Income-tax Officer determined the total income of the firm at Rs. 16,500 and assessed each of the 3 partners on the share to which each was entitled under the terms of the defunct partnership. The Commissioner of Income-tax revised the said order under S. 33 of the Act and held that the remaining partner must be assessed on the entire income of Rs. 16,500 under S. 26 (2) as a person "succeeding to the business of the firm." On a reference to the High Court whether the assessee could be assessed on the entire profits as successor under S. 26 (2) of the Indian Income-tax Act,

Held, that under the proviso to S. 26 (2) the successor can be taxed on the entire income only if the persons succeeded to cannot be found. As all the ex-partners were alive with known places of residence they cannot be deemed to be persons who could not be found. The assessment must therefore be distributed among the three partners according to their shares in the dissolved firm. The question whether "the succession" contemplated in S 26 (2) must have occurred in the year of account or not was left open.

T. S. Venkatesa Aiyar and *G. R. Jagadisan* for Assessee.

K. V. Sesha Aiyangar for the Income-tax Commissioner.

K.S.

Pandrang Row, J.
7th March, 1941.

Ratnammal *v.* Srinivasa Asari.
C.R.P. No. 962 of 1939.

Indemnity in sale deed—Limitation for enforcing—Cause of action when arises.

A covenant by the vendors of some land was in the following terms:—"We declare that there is no usufructuary mortgage or other mortgage created in respect of the said properties. Should there be any such burden we and our properties shall be liable to clear the same". In an action to enforce the covenant,

Held, that it was an express contract of indemnity to save the vendee from all loss in case any mortgage was found to be binding on the properties sold and Art. 116 of the Limitation Act was applicable and the cause of action commenced on the breach of the contract, which cannot be said to be complete till the property was actually brought to sale or till the sale was confirmed in enforcing the mortgages and the vendors were no longer in a position to save the property from the burden of the mortgages found to be existing.

K. S. Desikan for Petitioner.

N. R. Govindachari for Respondent.

K.S.

Pandrang Row and King, JJ.
13th March, 1941.

Venkatasubba Rao *v.* Papayya.
C.M.A. No. 529 of 1938.

Insolvency—Assignment by trader of his immovable property only—If assignment of "all his property" constituting an act of insolvency.

For the rule of law that—"if a trader assigns all his property except on contemporaneous payment, or, some substantial undertaking to make payment *in futuro,* that is an act of bankruptcy and is void against the creditors and the assignees"—to apply it must be shown that the trader has assigned all his property. Accordingly where the assignment is only of his immovable property and does not include movable property the rule does not apply.

19 Cal. 223 at 231 (P.C.), distinguished.

P. Somasundaram for Appellant.

T. Satyanarayana for Respondent.

K.S.

Pandrang Row and King, JJ.
14th March, 1941.

Narasimhamurthi *v.* Satyanandam and others.
C.M.A. No. 547 of 1938.

Charge—Decree directing a party to pay a certain amount and granting a charge "on all his property both movable and immovable"—Enforceability of the charge.

After removing a judgment-debtor from his office of trustee, the Court by its decree directed him to pay a certain amount with interest and also directed that all his property both movable and immovable should be charged for the amount due. In execution of that decree the charge was sought to be enforced. Rival decree-holders raised an objection that the charge was not enforceable in execution because the property charged was not specified.

Held, that the decree creating the charge was executable and was not void for uncertainty or on the ground that the property to which it relates was not specific.

T. Satyanarayana for Appellant.

B. V. Ramanarasu, P. Panini Rao and *M. S. Ramachandra Rao* for Respondents.

K.S.

N R C

Abdur Rahman, J. Venkataramana Chetti, Petitioner.
17th March, 1941.

C.R.P. No 505 and C.M.P. No. 1722 of 1941.

Civil Procedure Code (V of 1908), O. 11, r. 12—Interrogatories—Order requiring a party to state the result of his accounts—When proper.

In allowing interrogatories to be administered the Court should go into the questions put to the defendant and determine if it would be proper in the circumstances to order him to state the result of his accounts. (1895) 1 Ch. 334, referred.

T. K. Srinivasa Thathachariar for Petitioner.

K.S.

Wadsworth, J. Veeraswamy and another *v.*
18th March, 1941. Venkatanarasimha Rayanim.

C.R.P. No. 123 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 23—Applicability—Sale held under S. 118 of the Madras Estates Land Act—If can be set aside under S. 23 of Act IV of 1938.

S. 23 of Act IV of 1938 has no application to sales other than sales in execution of a decree. Accordingly an order by a Deputy Collector which purported, under S. 23 of Act IV of 1938, to cancel a sale held under S. 118 of the Madras Estates Land Act, is without jurisdiction and is liable to be set aside.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *P. Somasundaram* for Petitioners.

P. V. Rajamannar and *M. Sriramamurthi* for Respondent.

K.S.

Wadsworth, J. Rama Varma Valia Raja *v.*
19th March, 1941. Kochayissa and others.

C.R.P. Nos. 840 to 850 of 1939.

Madras Agriculturists' Relief Act (IV of 1938) S. 15—Applicability—"Panaya Kychits"*—Persons indebted under—If entitled to relief under the Act—Debt due if* "rent" *under S. 15 of the Act.*

The general tenor of the *panaya kychit* in suit was to refer to a mortgage of land on which a theoretical rent was fixed and out of that rent, part was to go towards the interest on the mortgage, part towards the assessment and the balance was payable to the mortgagor. In an application to have the panayam amount scaled down,

Held, that S. 15 of the Act IV of 1938, does not apply and that the persons indebted under what are known as *panaya kychits* in Malabar are entitled to claim relief under the Act.

(1940) 2 M.L.J. 712, followed.

T. R. Venkatarama Sastri and *T. V. Rajagopalan* for Petitioners.

B. Pocker, K. P. Ramakrishna Aiyar and *C. Karunakara Menon* for Respondents.

K.S.

Wadsworth, J. Kumaran and others *v.* Kunhunni
19th March, 1941. Nair.

C.R.P. Nos. 1871 and 1872 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 15—"Jenmi or intermediary"—Meaning.

A *mel panayamdar* or assignee of the right to collect rent under a *panaya kychit* is not included in the definition of jenmi or intermediary in S. 15 of the Agriculturists' Relief Act.

T. R. Venkatarama Sastriar and *K. S. Sankara Aiyar* for Petitioners.

Respondents not represented.

K.S.

Wadsworth, J.
21st March, 1941.

Satyavathamma *v.* Mallikarjuna Rao.
C.R.P. No. 537 of 1941.

Madras Agriculturists' Relief Act (IV of 1938), S. 4 (d)—Scope—Debt contracted on security of house property—If ceases to be such by reason of its discharging pre-existing simple money debt—Liability under personal covenant—If excluded.

It cannot be said that there is no debt 'contracted on the security of house property' merely because a mortgage discharged a pre-existing simple money debt. Nor can it be held that the liability comprised in the personal covenant embodied in a mortgage is a separate debt not contracted on the security of house property.

K. Kameswara Rao for Petitioner.

T. G. Krishnamurthi for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
24th March, 1941.

Kamanna *v.* Subramania Somayajulu.
C.R.P. No. 868 of 1939.

Madras Agriculturists' Relief Act (IV of 1938)—Assessment of debtor to profession-tax—Refusal of relief under the Act by lower Court—Subsequent suit and decree that assessment was invalid—If ground for interference in revision.

The Court below refused relief to the petitioner under Madras Act IV of 1938 on the ground that he had been assessed to profession-tax and was therefore excluded from the definition of 'agriculturist' Pending the revision petition against the order the petitioner filed a suit and obtained a declaration that the assessment was invalid and this declaration was relied on to prove that the petitioner was an agriculturist.

Held, that the order of the Court below being correct on the materials then available the subsequent declaration could not render it one passed without jurisdiction or materially irregular in the exercise of such jurisdiction.

P. Somasundaram for Petitioner.

K. Bhimasankaram for Respondent.

K.S.

Burn and Mockett, JJ.
24th March, 1941.

Naina Mohammad Rowther *v.* Periappa Rowther.
C.M.A. No. 272 of 1939.

Civil Procedure Code (V of 1908), O. 21, R 16—Scope.

An assignee of a decree applied for execution after his assignment was recognised in an earlier application. The debtor contended that the assignment was effected benami, that he had paid the amount to the original decree-holder, that it was arranged that the assignee should execute the decree against other defendants than himself and that whenever he required the assignee decree-holder to enter up satisfaction, he should do so. The lower Court rejected that plea *in limini* as the payment was not certified and therefore barred by O. 21, R. 2, Civil Procedure Code.

Held, such an arrangement cannot be recognised by any Court as it was opposed to O. 21, r. 16, Civil Procedure Code.

18 L.W. 453, distinguished.

K. Rajah Iyer and *K. S. Ramamurthi* for Appellant.

K. Bhashyam Ayyangar and *T. R. Srinivasan* for Respondent.

K.S.

Pandrang Row and King, JJ.
25th March, 1941.

Appalanarasimham *v.* Rajanna and others.
C.M.A. No. 67 of 1939.

Execution—Limitation—Money deposited to credit of decree-holder transferred to credit of another suit where decree-holder was judgment-debtor —Payment to attaching decree-holder—Whether "step-in-aid of execution to save limitation".

Certain costs which had been deposited in O.S. 45 of 1932, by the judgment-debtor were later on transferred to the credit of S.C. No. 309 of 1931 on the application of the appellant in execution of his decree in S.C. No. 309 of 1931. The money after being transferred to the account of S.C. No. 309 of 1931 (in which one of the judgment-debtors was the judgment-creditor in O.S. No. 45 of 1932), was paid to the appellant in execution of his own decree in S.C. No. 309 of 1931.

Held, that the payment to the appellant cannot be relied upon as a payment to the judgment-creditor in O.S. No. 45 of 1932, which would save limitation as a step-in-aid of execution of the decree.

I.L.R. 44 Mad. 971, distinguished.

K. Ramamurthi and *K. Someswara Rao* for Appellant.

V. Govindarajachari and *P. Satyanarayana Rao* for Respondent.

K.S.

Pandrang Row and King, JJ.
26th March, 1941.

Chidambaram Pandaram *v.* Lakshminarayana Chettiar.
C.M.A. No. 540 of 1939.

Civil Procedure Code (V of 1908), *O.* 21, *R.* 90*—Security—When to be demanded by Court—Issue of notice to other side and hearing counsel for other side—If admission of petition.*

Under O. 21, r. 90 the Court can demand security only before admitting the application to set aside a sale and not afterwards. Where notice has been ordered in the petition to set aside the sale and also in the petition to dispense with the security and the counsel for the other side was actually heard before orders were passed in both the petitions,

Held, that the issue of the notice is to be regarded as a step showing that the petition has been admitted and the actual hearing of the other side before passing orders makes the matter more certain. The fact that the Court did not intend to admit the petition does not affect the position and an order requiring security passed after that stage is one made without jurisdiction and must be set aside.

A. C. Sampath Aiyangar for Appellant.

C. D. Venkataramanan for Respondent.

K.S.

[F.B.]

The Chief Justice, Wadsworth and Somayya, JJ.
27th March, 1941.

The Secretary of State for India in Council represented by the Collector of Vizagapatam *v.* Allu Jagannadham.
S.A. No. 308 of 1938.

Madras Local Boards Act (XIV of 1920)*—Order of surcharge by Examiner of Local Fund Accounts—Amount paid by President of Union Board—Suit for recovery after unsuccessful appeal to the Government—Jurisdiction of Civil Courts.*

A person aggrieved by a surcharge order has one of two remedies open to him. He might either appeal to the Government against the order or he might apply to the principal Civil Court of Original Jurisdiction against the order.

Where the President of a Local Board sued, for recovery of monies paid by him under an order of surcharge by the Examiner of Local Fund Accounts, after his appeal to the Government against the order had been dismissed,

Held, that the plaintiff having elected one remedy could not again resort to the Civil Court for relief.

Held, further, that r. 6 framed under the Madras Local Boards Act, S. 199, sub-S. (2) providing remedy for persons aggrieved by a surcharge order was *intra vires*, the Local Government.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

B. Jagannadha Das for Respondent.

K.S.

The Chief Justice and Somayya, J.
28th March, 1941.

Ramalinga Aiyar *v.* Swaminadha Aiyar.
C.M.S.A. No. 71 of 1939.

International Law—Cochin subject — Change of domicil—Effect on jurisdiction of Cochin Court over the subject.

A Cochin subject does not lose his Cochin nationality by acquiring by birth British nationality and the Courts in Cochin have jurisdiction to pass a personal decree against such subject capable of execution in a British Indian Court.

B. Sitarama Rao and *S. Venkatachala Sastri* for Appellant.

T.M. Krishnaswami Aiyar and *C. K. Viswanatha Aiyar* for Respondent

K.S.

Pandrang Row and King, JJ.
31st March, 1941.

Rama Rao *v.* National Assurance Co., Ltd., Vizagapatam by its liquidator.
C.M.A. No. 21 of 1940.

Companies Act (*VII of* 1913), *S.* 280—*Order under—Whether appealable.*

No appeal lies against an order in an application under S. 280 of the Indian Companies Act. S. 202 of the Act does not confer a right of appeal against such an order as it applies only to orders made in winding up proceedings.

P. Somasundaram for Appellant.

S. Parthasarathy and *V. K. Thiruvenkatachari* for Respondent.

K.S.

Abdur Rahman, J.
31st March, 1941.

Bashyam Aiyangar (Petitioner).
C.R.P. No. 677 of 1941.

Civil Procedure Code (*V of* 1908), *O* 26, *rr.* 1, 4, 9—*Commission to examine witnesses residing within local limits of jurisdiction—Number of witnesses large—If ground for issuing commission.*

Where witnesses are residing within the local limits of the jurisdiction of the Court an application to issue a commission could not be granted unless it fell under either the one or the other of the rules (rr. 1 or 4 of O. 26, C. P. Code). The mere fact that there are a large number of witnesses is no ground for issuing a commission to examine them. O. 26, r. 9, which concerns issue of commissions for local investigation only has nothing to do with the examination of witnesses.

V. S. Rangachari and *M. C. Srinivasan* for Petitioner.

K.S.

Abdur Rahman, J. Bemraj Sowcar *v.* Mottayya Mudaliar.
31st *March,* 1941. S.A. No. 360 of 1938.

Practice—Plea of limitation—Not to be allowed to be raised for the first time in appeal—Limitation—Acknowledgment by joint family manager—How far binding on minors—Sale of mortgaged oil engine by an executing creditor—Mortgagee's rights over sale proceeds.

A manager of a joint Hindu family consisting of himself and his two step-brothers sold an oil engine to the appellant. In a suit for possession by the vendee the sale was held not binding on the shares of the step-brothers. The manager and the step-brothers who were minors represented by their mother executed a mortgage over the oil engine to the respondent. In other proceedings the engine was sold and the proceeds were brought into Court. The respondent filed a suit on his mortgage claiming the sale proceeds to the extent of the minors' shares and relied on an acknowledgment of liability on the part of the mother of the minors to save limitation. The appellant a creditor of the family who attached the engine pleaded that the suit was barred and also that the mortgage did not extend over the sale proceeds of the oil engine. The plea of limitation was raised only in the appellate Court.

Held, that (1) a point of limitation involving a mixed question of fact and law should not be permitted to be raised for the 1st time in appeal;

(2) an oil engine attached to the earth in a shed belonging to the same owner would be immovable property;

(3) a father or mother is a lawful guardian within the meaning of S. 21 of the Limitation Act and can extend the period of limitation by an acknowledgment in respect of a mortgage of joint family property even where there is a manager other than the father. I.L.R. 1940 Mad. 358 (F.B.), applied;

(4) in the case of mortgage of movable property the security extends to the sale proceeds of the hypotheca where the sale is not due to any default on the part of the mortgagee.

47 M.L.J. 704; I.L.R. 5 Mad. 330, distinguished.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellant.

K. S. Sankara Aiyar and *T. V. Rajagopalan* for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. Ramaswami Udayan and others
1st *April,* 1941. *v.* Ramanathan Chettiar (No. 2).
C.M.P. No. 996 of 1941.

Madras Agriculturists' Relief Act (IV of 1938)*—Relief under—Leave to appeal to the Privy Council—Valuation of appeal—Civil Procedure Code (V of* 1908), *Ss.* 109 *and* 110.

An application for relief under the Agriculturists' Relief Act and for entering up satisfaction of a decree for Rs. 10,000, was refused by the District Judge and an appeal therefrom to the High Court [(1941) 1 M.L.J. 6] was also dismissed as infructuous by reason of the supersession of the original decree by an appellate decree passed after the passing of Act IV of 1938. In an application for leave to appeal to the Privy Council,

Held, that the scope of relief under the Act was the determining factor and as the principal amount of the debt Rs. 3,200 could not be scaled down the same ought to be excluded in computing the value of the appeal.

The contention that there was no right of appeal to the Privy Council as an order on an application to scale down a decree is not appealable, was not gone into.

N. Sivaramakrishna Aiyar for Petitioners.

K. S. Ramabhadra Aiyar for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
2nd April, 1941.

Arumugam Chettiar *v.*
Nagaswami Aiyar.
C.M.A. No. 364 of 1939.

Surety bond—Construction—S. 145, Civil Procedure Code—Applicability—Proper remedy against surety—Separate suit if necessary.

X, a third party executed a surety bond to the Additional Sub-Judge, Madura in the following terms:—"If the said A.S. No. 406 of 1930 in the High Court results favourably to the plaintiff my under-mentioned property will be answerable for Rs. 2,253. If the said property is not sufficient, myself, my heirs and administrators and my other immovable and movable properties shall remain bound."

On the appeal (No. 406 of 1930) resulting favourably to the plaintiff he sought to enforce the security bond by applying for the arrest of the surety and it was held by the High Court in C.M.A. No. 411 of 1936 that the properties alone should be proceeded against.

An application was then made by the decree holder for restitution for costs and for enforcement of the security bond against *X* and his sons, as well as the principal debtor; and it was ordered by the lower Court. On appeal, it was urged on behalf of the sons of the surety that the security bond did not impose any personal liability on the appellant or his father; that S. 145, C.P.Code, had no application to the case and as the bond was in favour of the judge and not merely of the Court it should be assigned to the party and sued upon and that the proper remedy was only by way of suit.

Held, (*i*) that the construction of the bond in the earlier proceedings (C.M.A. No. 411 of 1936) was conclusive between the parties in the present proceedings;

(*ii*) that S. 145, C.P.Code, had no application to the case; and

(*iii*) that the proper remedy was only by way of suit after getting the bond assigned over to the decree-holder.

K. S. Ramabhadra Aiyar for Appellant.

B. Sitarama Rao and *C.V. Baluswami* for Respondent.

K.S.

Pandrang Row and King, JJ.
2nd April, 1941.

The Official Receiver of East Tanjore,
v. Rangaswami Iyengar and others.
C.M.A. No. 142 of 1939.

Execution—Decretal portion of order—If can be gone behind in confirming the sale in execution—Practice—Appeal—Preliminary objection—When to be raised.

In execution of a decree for money, properties comprised in lots Nos. 4, 9, 10, 11, 12, 13 and 15, were sold on 21st January, 1935. An application to set aside the sale under O. 21, r. 90, Civil Procedure Code, was filed. Therein reference was made to the sales held on 21st January, 1935, but in the body of the application, reference to lot No. 13, was omitted by mistake. The Court set aside the sales held on 21st January, 1935. However, in the view that there was no reference to lot No. 13 in the application the sale was confirmed in respect of that lot. The appellant representing the judgment-debtor applied to set aside the confirmation order. That was rejected on the ground that the sale of lot No. 13, was not set aside. On appeal,

Held, that the decretal portion of the order referred to the sales on 21st January, 1935, which included lot No. 13, as well, and the Court could not go behind that and confirm the sale on the footing that the sale was not set aside. The confirmation order was without jurisdiction.

(2) It has been a practice of this Court that whenever a question as to the maintainability of the appeal is sought to be raised, that should be done preliminarily and not after the appeal on the merits is argued.

K. Bhashyam Ayyangar and *T. R. Srinivasan* for Appellant

Ch. Raghava Rao for Respondent.

K.S.

Wadsworth, J.
4th April, 1941.

Naranappa Naicker *v.* Krishnaswami Naicker.
C.R.P. No. 2274 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 9 (1), *proviso—Omission of words "in favour of the same creditor"—Effect.*

Where a promissory note executed before the 1st October, 1932, in favour of *A* is renewed in 1936, in favour of *B*, the debtor is not entitled to have the debt scaled down under S. 8 as a debt incurred before 1—10—1932. The debt can only be scaled down under S 9, as the promisees under the promissory notes are different and there is no renewal "in favour of the same creditor." The omission of these words in the proviso to S. 9 (1) does not entitle the debtor to have the debt scaled down under S. 8, as it has been held that there can be no renewal unless the parties to the two promissory notes are the same. (1940) 2 M.L.J. 664; (1940) 2 M.L.J. 517; *Barber* v. *Mackell,* 68 L.T. 29, followed.

P. S. Narayanaswami Aiyar for Petitioner.

V. Seshadri and *V. Ramaswami* for Respondents.

K.S.

Wadsworth, J.
4th April, 1941.

Sivanarayana *v.* Satyanarayana.
C.R.P. No. 2253 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 15 *and* 19—*Relief under S.* 15—*Absence of provision for procedure in the Act—Proper procedure.*

An agriculturist tenant against whom a rent decree had been passed deposited the rent for fasli 1347 and filed an application to the Deputy Collector under S. 15 of Act IV of 1938 for relief. The landholder contended before the High Court in revision, that unless an application under S. 19 of the Act is filed and the decree amended the tenant cannot have relief under S. 15. For amending a Revenue Court's decree for rent there is no provision in the Act, S. 19 being applicable only to decrees for repayment of debts.

Held, that it is advisable for the Revenue Courts to amend the decree and grant relief under S. 15 by treating the application as analogous to an application under S. 19, and as in the present case the decree was of the same Court there was no prejudice caused to the landholder and there was no ground for interference in revision.

N.V.B. Sankar Rao for Petitioner.

A. Lakshmayya for Respondent.

K.S.

The Chief Justice and Somayya, J.
18th March, 1941.

Devarajulu Naidu *v.*
Jayalakshmi Ammal.
C.C.C.A. No. 79 of 1939.

Limitation Act (*IX of* 1908), *Arts.* 62 *and* 120—*Applicability.*

On 9th January, 1931 two brothers *A* and *B* sold certain immovable properties to one *K* for Rs. 3,000 and in part discharge of the purchase consideration *K* executed a promissory note for Rs 1,500 in favour of *C* the wife of *A*. *C* quarrelled with *A* whom she eventually left. On 5th November, 1931 *C* fraudulently endorsed the promissory note to one *D* without consideration with the object of defeating *A* and *B*. In 1932, *D* filed a suit against *K* on the promissory note and on 19th July, 1933 he obtained a decree for Rs. 1,653-8-0 The decree was set aside on appeal and the suit was remanded for taking fresh evidence on 9th August, 1934. A new decree for Rs. 1,653-8-0 after further hearing was passed on the 26th November, 1934.

A and *B* filed the present suit on 26th November, 1937 to recover from *C* and *D* the Rs. 1,653-8-0 which *D* had recovered from *K*. On the question of limitation,

Held, that the real claim was against *D* in whose hands were the moneys paid by *K* in discharge of the promissory note. In endorsing the note C wrongly converted it and as *D* took it with full knowledge of the facts he acquired no title to it. The suit was in time as there was an equitable claim which came within Art. 120, and Art. 62 of the Limitation Act was not applicable. *C* was a trustee for *A* and *B* who were entitled to trace the proceeds of the properties in the hands of D.

V. T Rangaswami Aiyengar and *P Krishnamachari* for Appellants.

Srinivasaraghavan for Respondent.

K.S

Pandrang Row and King, JJ.
25th March, 1941.

Veeraswami *v.*
Namayya and others.
A.A.O. No 70 of 1939.

Civil Procedure Code (*V of* 1908), *O.* 21, *r.* 93—*Application for refund of poundage and interest on the purchase money—Limitation.*

The auction purchaser filed an application under O. 21, r 93, C.P. Code for refund of the poundage and interest on the purchase money, the actual purchase money having been recovered by him through Court on an earlier occasion. The decision of the first Court setting aside the sale was carried up to the High Court in appeal by not only the auction purchaser but also by others, and the appeals were disposed of only on 6—10—1937, though the original order setting aside the sale was on 15—11—1934.

Held, that the date of the appellate Court's decree must be taken as the starting point for limitation

K. Kameswara Rao for Appellant.

Respondent not represented.

K.S.

Wadsworth and Patanjali Sastri, JJ
25th March, 1941

Gopala Maller *v* Vallithoduvayil Velloth Krishnan
C.R.P. No. 250 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S* 19—*Execution in* 1933, *of a fresh promissory note by* C *along with* A *in satisfaction of decree against* A *and* B *resulting from their prior debt incurred before* 1932—*Scaling down.*

N R C

A and *B* were indebted under a contract which was anterior to 1932. The debt ripened into a decree in 1933, to discharge which a fresh promissory note was executed by *C*, who was not concerned in the earlier debt, along with *A*. *A* and *C* being agriculturists applied under S. 19 to scale down the debt and the lower Court scaled down the debt as against both *A* and *C* on the basis of its being a renewal of the original liability. On revision,

Held, that the basis of scaling down was correct as far as the liability of *A* was concerned, but as against *C* who was not established to be a surety but was jointly and severally bound to pay the amount in consideration of the satisfaction of the decree debt against *A* and *B*, the plaintiff was entitled to a decree on the suit promissory note with interest at 5 per cent. from the date of the note to 22nd March, 1938, and thereafter at 6 per cent. and proportionate costs

(1940) 2 M.L.J. 517, (1940) 2 M.L J. 786 and C.R.P. No. 1905 of 1940, referred to.

O. T. G. Nambiar for Petitioner.

P. Govinda Menon for Respondents.

K.S.

The Chief Justice, Krishnaswami Aiyangar and Somayya, JJ.
8th April, 1941.

Thiruvengada Mudaliar v. Rajabathar Mudaliar.

L.P.A. No. 18 of 1940.

Hindu Religious Endowments Act (XX of 1863)—Devasthanam Committee created under—Appointment of trustee by—If can be for a term of years or must be for life—Trustee—Whether servant of the Committee.

The Devasthanam Committee of Madras appointed under the Hindu Religious Endowments Act has an unfettered discretion, subject to the special conditions of particular endowments to appoint a trustee for a term of years if it considers that it should be so in the interests of any particular trust.

So far as Madras is concerned it is settled by authorities that a trustee is not a servant of the committee.

Case-law discussed. Decision of King, J., in (1940) 2 M.L.J. 5, affirmed.

N. Sivaramakrishna Aiyar and *A. Venkatasubbu Mudaliar* for Appellant.

N. Srinivasa Aiyangar amicus curiae.

K.S.

Gentle, J.
15th April, 1941.

Thimmappa Chettiar v Thangavelu Chettiar and another.

S.A. No. 693 of 1938.

Practice—Costs—Assignee from decree-holder impleaded in appeal, actively supporting lower Court's decree—Liability for costs of appeal and of trial.

Where the assignee of a money-decree who was made a party in an appeal against the decree by the defendant, actively supported the decree, an order directing him to pay to the defendant who succeeded in the appeal not merely his costs of the appeal but also of the trial will not be improper.

21 Bom. 167, applied.

K. V. Ramachandra Aiyar and *S. Tyagaraja Aiyar* for appellant.

S Venkataraman for Respondent.

K.S.

Abdur Rahman, J.
24th March, 1941.

Namburi Subbayya *v.* Namburi Pitchayya, minor by guardian, Chagandrati Chandrayya.
S.A. Nos. 41 and 42 of 1937.

Hindu Law — Stridhanam — Inheritance — Illegitimate daughters of Brahmin widow—Preference over illegitimate sons.

The illegitimate daughter of a Brahman widow is entitled to succeed to her mother's stridhanam properties in preference to her illegitimate sons. 21 Mad. 40, relied on.

There is nothing in principle to draw any distinction between the status of degraded women whether they belonged to one caste or other, at least so far as the right to inherit their stridhanam property is concerned.

B. V. Subrahmanyan for Appellants.

T. Thyagaraja Aiyar for Respondents.

K S.

Pandrang Row and King, JJ.
26th March, 1941.

Rudrai Goundan *v.* Karithiruma Goundan.
A.A.O. No. 562 of 1938.

Guardianship — Guardian of person — Paternal grandmother and maternal grandmother—Preference.

There is no rule of law that the maternal grandmother should be preferred and even from the point of view of human nature it is impossible to say that the maternal grandmother is always to be presumed to be a more suitable guardian of a minor's person than the paternal grandmother. The fact that the minor's father was in jail, undergoing a sentence for the murder of his wife, that is, the minor's mother, does not affect the question in the absence of any allegation that the parents of the man in jail had anything to do with the murder, either before or after the event.

T. R. Srinivasan for Appellant.

D. Ramaswami Aiyangar, T. P. Kannabhiran, M. V. Gopalaratnam and *R. Visvanathan* for Respondents

K.S.

The Chief Justice and Mockett, J.
1st April, 1941.

Loomchand Sait *v.* Official Liquidator, Indo-Carnatic Bank, Ltd.
O.S.A. No. 58 of 1940.

Indian Companies Act (VIII of 1913)*—Rules framed under r.* 60 (1) *—Power of Court to extend time—When to be exercised.*

The appellant's name having been placed in the list of contributories, the appellant challenged the right of the Official Liquidator to do so. When the case was called the liquidator took the preliminary objection that the application was out of time. On the question of the Court's power to extend the time,

Held, that the Court can extend time only when real and sufficient grounds are shown for the order and the appellant having failed to show such reason his petition must be dismissed.

K. Rajah Aiyar and *A. V. Narayanaswami Aiyar* for Appellant.

S Srinivasaraghavan for Respondent.

K.S.

Pandrang Row and King, JJ.
1st April, 1941.

Official Receiver, East Tanjore at Negapatam *v.* Lakshmanan Chettiar.
A.A.O. No. 77 of 1939.

Civil Procedure Code (V of 1908), *O.* 21, *r.* 90*—Waiver of right to fresh proclamation—Whether waiver of objection to irregularities in the proclamation.*

N R C

The judgment-debtor on his formally giving up his right to have a fresh proclamation obtained adjournments of the execution sale. There were some irregularities in the proclamation in the shape of extremely inadequate upset prices fixed and omission to state material particulars.

Held, that it was not open to the judgment-debtor or the Official Receiver who succeeded in his place to rely on the irregularities and defects in the sale proclamation by reason of the waiver of a fresh proclamation which necessarily implied waiver of objections to any defect appearing on the face of the sale proclamation. 48 L.W. 199 : (1939 1 M.L.J. 147 (P.C.), followed.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellant.

S. Panchapagesa Sastri, K. R. Krishnaswami Aiyar and *R. Ramamurthi Aiyar* for Respondent.

K.S.

Pandrang Row and King, JJ.
3rd April, 1941.

Dayananda Mudaliar
v. Provincial Government of Madras.
A.O. No. 195 of 1939.

Civil Procedure Code (V of 1908)—Practice — Decree in suit instituted in forma pauperis*—Plaintiff to pay a larger sum to defendant than what plaintiff had to receive from defendant—Effect on right of Government to execute for its costs.*

In a suit in *forma pauperis* the decree directed the plaintiff to pay Rs.502-7-0 to the Government for court-fees due to it and made it a first charge on the amount decreed to the plaintiff. The decree allowed to the plaintiff Rs. 63, and Rs. 7 as costs (Rs. 70 in all). On the other hand the plaintiff was ordered to pay the defendant Rs. 360 for proportionate costs with interest.

Held, that in the circumstances the defendant could not be legally deprived of the right to set off and the application by the Government for execution should have been dismissed *in limine* on the ground that the so-called charge covered a minus quantity.

K. Y. Adiga and *S. Ramayya Naik* for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K.S.

Wadsworth, J.
3rd April, 1941.

Muthu Goundan *v.*
Velappa Goundan.
C.R.P. No. 2201 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 3 (ii) (a) and 23 —Mortgagor continuing in possession after sale of the hypotheca in execution of mortgage decree—Whether "agriculturist" entitled to benefits of the Act.

There may possibly be cases in which a person in possession who is unable to prove a full title might be held to have a saleable interest in the property. But in a case where the whole of the right, title and interest of the mortgagor had already been sold in execution of the mortgage decree and the mortgagor still retains possession of the property it cannot be held that the mere possession of the mortgagor in the interval between the sale and the delivery of the property could amount to a "saleable interest" in the property. To qualify a person as "agriculturist" under Act IV of 1938 there should be at least some degree of title which the holder thereof could convey to somebody else and a mere squatting on the land after the owner's title has passed cannot amount to such saleable interest sufficient to qualify the squatter for the benefits of the Act.

T. Krishna Rao for Petitioner.

K. Sankara Sastri for Respondent.

K.S.

Burn and Mockett, JJ.
4th April, 1941.

Ramaswami Reddiar *v.* The Official Receiver of South Arcot and another.
C.M.A. No. 264 of 1939.

Provincial Insolvency Act (V of 1920), *S.* 68—*Sale of insolvent's property by auction—Subsequently circularising creditors inviting higher bids—Propriety—Cause of action for applying under S.* 68—*When arises.*

After due advertisement the insolvent's properties were sold by the Official Receiver to the appellant for Rs. 118 on 13—8—1937 when a portion of the purchase price was paid. The balance was paid on 18—9—1937, the sale confirmed on 11—11—1937 and the sale deed executed on 6—5—1938. The respondent had offered to purchase the properties for Rs. 120 and deposited the amount with the Official Receiver on 16—2—1938. The Official Receiver then directed notices to the creditors returnable on 14—10—1938 to show why the higher offer should not be accepted. On the return date the Receiver stated that the properties had already been sold on 7—7—1938. The respondent filed a petition to the District Court to set aside the sale. The sale was set aside by the District Judge on the ground of certain irregularities with regard to the confirmation of sale. On appeal,

Held, that the procedure with regard to the sale of such properties was imperfect, the practice of circularising creditors inviting higher bids after the auction was held, should be condemned, for persons would not come forward and bid at the public auction, if the highest bid was not to be accepted.

Held, further, that the cause of action for filing a petition to modify, cancel or reverse an order of the Official Receiver arose on all the dates connected with the sale.

A. S. Srinivasa Ayyar and *S. Seshadri* for Appellant.

K. Venkataraghavachariar for Respondent.

K.S.

Pandrang Row, J.
8th April, 1941.

Achayya *v.* Venkatanarasamma.
C.R.P. Nos. 772 and 773 of 1940.

Civil Procedure Code (V of 1908), *O.* 44, *r.* 1, *proviso—Applicability of proviso—If can be considered after notice is issued to respondent.*

In deciding petitions for leave to file appeals in *forma pauperis* once notice to the respondent goes, it is no longer open to the judge who orders notice and of course to his successor to reconsider the question whether the proviso to O. 44, r. 1 would apply, it being presumed in the circumstances that before issuing notice the question of the applicability of the proviso was considered and decided in the negative. I.L.R. 58 Mad. 982, followed.

A.I.R. 1931 Pat. 183 (F.B.), referred to.

Ch. Raghava Rao for Petitioner.

N. Narasimham for Respondent.

K.S.

Pandrang Row, J.
9th April, 1941.

Venugopala Mudaliar *v.* T.V.R. & Co., by managing partner.
C.R.P. No. 1473 of 1940.

Madras Debt Conciliation Act (XI of 1936), *Ss.* 9 *and* 25—*Dismissal of petition under S.* 9—*Restoration—If revives stay under S.* 25.

Where a dismissal of a petition was under S. 9, neither that section nor any other section in the Act contemplates the cancelling of an order of such dismissal and restoration of the petition to the file. The stay under S. 25 can apply only once to the same debt and the restoration of the petition cannot restore the stay which also came to an end when the application was dismissed by the Board under S. 9 of the Act.

P. B. Ananthachariar for Petitioner.

M. S. Venkatarama Aiyar for Respondent.

K.S.

Pandrang Row, J
9th April, 1941.

Ramamma *v.* Subba Reddi.
C.R.P. Nos. 92 and 103 of 1941.

Civil Procedure Code (V of 1908), *O.* 32, *r.* 15—*Scope and applicability—Finding under Lunacy Act that a person was not a lunatic—Effect.*

The definition of a "lunatic" in the Lunacy Act is different from the requirements prescribed under O. 32, r. 15, C.P.Code. Under the Lunacy Act a lunatic is defined as an idiot or a person of unsound mind, whereas under the language used in O. 32, r.15 he is "a person who is either adjudged to be of unsound mind or a person, though not so adjudged, is found by the Court on enquiry by reason of unsoundness of mind or mental infirmity to be incapable of protecting his interest when suing or being sued". Accordingly when an application is made under O. 32, r. 15, C. P.Code, it cannot be held that it does not lie without holding any enquiry merely because it has been held in proceedings under the Lunacy Act that the defendant was not a lunatic.

P. Chandra Reddi for Petitioner in C.R.P. No. 92 of 1941 and for Respondent in C.R.P. No. 103 of 1941.

Ch. Raghava Rao for Respondent in C.R.P. No. 92 of 1941, *C. A. Vaidyalingam* and *T. Venkatadri* for Petitioner in C.R.P. No. 103 of 1941.

K.S.

The Chief Justice and Somayya, J.
16th April, 1941.

Kurivella Subba Rao *v.*
Kavi Satyanarayanamurthi and
Debt Conciliation Board, Rajahmundry.
C.M.P. No. 7312 of 1940.

Madras Debt Conciliation Act (XI of 1936), *S.* 10 (1)—*Creditor filing statement—Board calling for accounts—Order discharging the debt for failure to produce account—Propriety.*

A creditor while filing his statement of debt giving particulars stated that the account books were filed in Court in connection with a suit. On the adjourned date as the creditor was still unable to produce the account books and absented himself the Board passed an order discharging his debts. In an application to quash the proceedings,

Held, that the Board had no jurisdiction to discharge the debt when the creditor complied substantially with the provisions of S. 10 (1) of the Act. The failure of the creditor to produce his account books did not warrant the Board to pass such a confiscatory order. The order should be quashed. The Board was directed to pay Rs. 200 as costs.

M. S. Ramachandra Rao for Petitioner.

M. Appa Rao for Respondent.

The Debt Conciliation Board not represented.

K.S.

Wadsworth, J.
27th March, 1941.

Thirumala Rao *v.* Kasturichand Hanumandas Firm
A.A.O. No. 23 of 1940 converted into C.R.P. No. 536 of 1941.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Mortgage—Final decree for sale—Whether decree for repayment of a debt.

The language of S. 19 of Act IV of 1938 is wider than that of O. 21, r. 16, C.P.Code, and a final decree which directs the sale of the hypotheca and the payment of the proceeds to the mortgagee is a decree for the repayment of the mortgage debt which can be scaled down. 49 Mad. 508, distinguished.

P. Satyanarayana Rao and *M.S. Ramachandra Rao* for Petitioner.

V. Rangachari for Respondent.

K.S.

Pandrang Row and King, JJ.
1st April, 1941.

Muthukumaraswami Mudaliar and others *v.* The Official Liquidator of the Coimbatore Pasupathi Bank, Ltd.
A.A.O. No. 389 of 1940.

Indian Companies Act (VII of 1913), S. 246—Rules framed by Madras High Court—Whether applicable to proceedings before the District Court to which further proceedings for and in liquidation are transferred.

There is no reason why the rules framed by the Madras High Court under S. 246 of the Indian Companies Act, which *prima facie* are meant to be in force only in respect of proceedings in the High Court should be regarded as applicable to the procedure to be followed in the District Court, to which subsequent proceedings for and in the winding up were transferred by the High Court which made the liquidation order.

P. V. Rajamannar, K. Subba Rao and *C. A. Vydialingam* for Appellant.

C. S. Swaminathan for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
3rd April, 1941.

Nagarajan (Minor by guardian) *v.* Krishna Aiyar.
A.A.O. No. 403 of 1939 converted into C.R.P. No. 775 of 1941.

Madras Agriculturists' Relief Act (IV of 1938), S. 23—Applicability—Mortgagor assigning his rights subject to another usufructuary mortgage after the filing of a suit on the simple mortgage—Final decree and sale of some items of property in execution—Right of mortgagor and usufructuary mortgagee to have sales set aside under S. 23.

A suit on a simple mortgage executed on 17-5-1928 was filed in 1934 and while the suit was pending the mortgagor sold the equity of redemption to the 8th defendant subject to a usufructuary mortgage in favour of the 6th defendant. The preliminary decree was passed on 7—3—1935. Subsequently there was a final decree and certain items of the hypotheca were sold before Act IV of 1938 came into force. On 17—11—1937 the decree-holder bought to sale two items of the hypotheca, which he purchased himself on 20—6—1938. The mortgagor applied under S. 23 of Act IV of 1938 to set aside the sale of 20—6—1938.

Held, that the most the mortgagor could get by redeeming the mortgage would be a right to the return of the mortgage deed with an endorsement of discharge and the delivery of the title deeds of the land, which he would then have to hold as a trustee for his vendee. Such right does

not connote an interest in the property sufficient to satisfy the first clause of S. 23 of Act IV of 1938. 44 Mad. 554, distinguished. But the usufructuary mortgagee who was impleaded as the 6th defendant, if not otherwise disqualified, may be entitled to claim relief under the Act.

K. V. Sesha Aiyangar for Appellant.

T. K. Sundararaman for Respondent.

K.S.

Wadsworth, J.
4th April, 1941.

Dorayya and others *v.* Satyanarayana and others.
C.R.P. No. 2225 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 4 (h)—*Scope.*

A debt was originally due to a man who died during the pendency of a suit thereon and his widow was impleaded as his legal representative and a decree was passed in her favour. On 21—12—1935 this lady transferred her decree to the first respondent. The deed of transfer recited that the transferor will, if there be any obstruction at the time of the recovery of the decree debt, clear such obstruction at her own expense. The transfer was ultimately recognised by the Court on 6—2—1937 after which date the transferee alone became entitled to execute the decree. The District Munsif held that by reason of the indemnity for costs, the lady continued to be interested in the decree debt and S. 4 (*h*) was applicable. On revision,

Held, that after recognition of the transfer by the Court so far as the judgment-debtor was concerned the only person to whom the debt was payable was the transferee and the transferor ceased to have the right to recover anything from the judgment-debtor. S. 4 (*h*) of Act IV of 1938 had no application in the circumstances.

P. Somasundaram for Petitioner.

P. Satyanarayana Raju, M. R. Raju and *S. Venugopal Rao* for Respondents.

K.S.

King, J.
7th April, 1941.

Ranganathan Chettiar *v.* Subramaniam Chettiar.
C.R.P. No. 622 of 1940.

Madras Debt Conciliation Act (*XI of* 1936), *Ss.* 9 *and* 25—*Dismissal of application for conciliation with permission to file fresh petition—Fresh petition in pursuance—Stay of execution of decree—If can again be granted.*

In dismissing an application for conciliation after it was pending for eight months the Board granted in its order liberty to apply again. It was contended that a fresh application filed in pursuance of the liberty must be treated as a restoration of the previous application and that therefore the debtor was entitled to obtain again an order for stay of execution of his decree.

Held, that the distinction between S. 7 and S. 9 would make the permission granted by the Board to apply again, one which the Board had no jurisdiction to grant. Even if the two applications are treated as one, where more than one year has passed without conciliation being effected the petition must be dismissed. Therefore the debtor cannot obtain again a stay of execution of the same decree.

B. K. B. Naidu for Petitioner.

T. L. Venkatarama Aiyar for Respondent.

K.S.

Pandrang Row, J.
8th April, 1941.

Bindu Madhava Rao *v.* Subba Reddi.
C.R.P. No. 755 of 1940.

Madras Debt Conciliation Act (*XI of* 1936), *S.* 10 (3)—*Order of Board discharging debt due to a creditor for failure to file statement of debts within two months of notice—Application to District Court to revive debt—Limitation—Starting point.*

An application to revive a debt should be filed within two months of the order declaring the debt to be discharged and not from the date of notice to him calling for statement of his debts. An application within two months after he became aware of the passing of the order discharging his debt will be in time.

P.V.Rajamannar, K. Subba Rao and *M. Srinivasa Rao* for Petitioner.

P. Chandra Reddi for Respondent.

K.S.

Pandrang Row, J.
9th April, 1941.

Govindaswami Naicker *v.* Javanmull Sowcar.
C.R.P. No. 986 of 1940.

Practice—Ex parte *decree—Application to set aside—Sufficient cause established—Conditions, if can be imposed in setting aside the decree—Practice—Personal knowledge of judge—Decision when can be based on.*

Where sufficient cause has been established for defendant's absence when the case was called on, the defendant is entitled to have the *ex parte* decree against him set aside. It is not a matter of privilege or indulgence and it is not proper to order the defendant to deposit the full amount of the decree in Court as a condition.. The *ex parte* decree must be set aside without any condition being imposed.

In no case is it desirable that a decision should depend on the personal knowledge of the Judge himself as regards a matter of fact which is not peculiarly within his knowledge.

S. Krishnamachariar and *K. Subba Rao* for Petitioner.

V. S. Arunachalam for Respondent.

K.S.

Wadsworth, J.
9th April, 1941.

Hanumantha Rao *v.* Basavayya.
A.A.O. No. 38 of 1938 converted into C.R.P. No. 756 of 1941.

Madras Agriculturists' Relief Act (*IV of* 1938), *Ss.* 19 *and* 20—*Dismissal of application under S.* 20 *for stay—Application under S.* 19, *if to be made within* 60 *days of order under S.* 20.

The dismissal of a stay application for default can only have the effect of deciding that no stay under S. 20 of Act IV of 1938 is to be granted. That is no bar to an application under S. 19 filed after 60 days, as the statutory period of limitation under S. 20 only applies when a stay has been granted.

K. Kameshwara Rao for Petitioner.

V. Govindarajachari for Respondent.

K.S.

Wadsworth, J.
16*th April*, 1941.

Kailasanatha Naipar *v.* Natesan Chettiar.

C.R.P. No. 355 of 1941.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 19—*Applicability —Order under S.* 151, *C. P. Code, fixing amount due in restitution—If governed by S.* 19 *of Act IV of* 1938.

Though an order under S. 151, C.P.Code, which determined the precise amount due in proceedings for restitution, may not be technically speaking a decree it was certainly a final adjudication of the amount payable by the petitioner to the respondent which could only be modified by some procedure known to law. In the case of such an order a procedure analogous to that in S. 19 of Act IV of 1938 should be applied. When such final adjudication took place after Act IV of 1938 came into force and the person liable to pay failed to apply for relief under the Act at a time when it was available to him he cannot be heard to put it forward at a later stage as a reason for modifying the order.

S. Rajaraman and *S. Kothandarama Nayanar* for Petitioner.

M. Krishna Bharathi for Respondent.

K.S.

Burn and Horwill, JJ.
24*th April*, 1941.

Ratnavelu Achari *v.* Sheik Dawood Rowther.

R.C. No. 9 of 1941.

Civil Procedure Code (*V of* 1908), *O.* 46, *r.* 1—*Reference to High Court—When to be made.*

The only cases in which a reference may be made to the High Court under O. 46, r. 1 of the C.P.Code, are suits or appeals in which the decree is not subject to appeal. Where the decree which will be passed in the suit will be appealable a reference to the High Court will be incompetent.

K.S.

Mockett, J.
24*th April*, 1941.

Ayyar and Co. *v.* Rex.

Cri.R.C. No. 1100 of 1940, etc.

Madras District Municipalities Act (*V of* 1920), *S.* 306, *clause* (28)—*Power of Municipal Council to make bye-laws for prohibition and regulation of advertisement in public streets and parks—If includes power to levy licence fee for advertisements.*

S. 306, cl. (28) of the Madras District Municipalities Act empowering a Municipal Council to make bye-laws for the "prohibition and regulation of advertisement in public streets or parks" did not authorise the levy of a licence fee in relation to advertisement. Accordingly a person cannot be convicted for displaying goods (aerated water) on a bullock cart and having a name board in his shop without paying the fee levied by a Municipal Council for licences for advertisement.

K. Bashyam Aiyangar and *R. Desikan* for Petitioners.

The Public Prosecutor for the Crown.

K.S.

King, J.
9th April, 1941.

Achuthan and another *v.* Katteeja Bi and others.
S.A. No. 538 of 1939.

Malabar Tenancy Act (XIV of 1930), *S.* 20, *sub-S.* (5)—*Eviction—Grounds—Jenmi requiring the land* bona fide *for his own cultivation—Meaning of "requires".*

When a landlord demands or asks for or sues for any land on the ground that he wishes to cultivate it himself his statement that he wishes to cultivate it himself, must be made *bona fide.* There need be no element of need necessarily present. "Requires" in sub-S. (5) of S. 20 of the Malabar Tenancy Act does not mean "is in actual positive need".

Decision of Venkataramana Rao, J., in S. A. No. 42 of 1939, dissented from.

Leave to appeal granted.

K Kuttikrishna Menon and *K. Govindan* for Appellants.

B. Pocker and *M. C. Sridharan* for Respondents.

K.S.

King, J.
15th April, 1941.

Bakshi Matra Patrudu *v.* Balakrishnamma Dora.
S.A. No. 236 of 1938.

Limitation Act (IX of 1908), *Art* 110—*Applicability—Suit for arrears of rent—"Rent" if includes* shrotriem.

After a survey of a village the Record of Rights was published in 1920. An entry was corrected in 1924 and referred to personal inams of respondent on which a *shrotriem* of Rs. 60 per annum was declared to be payable. The appellant the proprietor of the estate filed a suit under S. 173 of the Madras Estates Land Act. The suit was dismissed and an appeal therefrom was also dismissed by a judgment delivered on 21st November, 1930. Within three years of this date the proprietor filed a suit for arrears of *shrotriem* for 11 faslis (1332 to 1342).

Held, that the article of the Limitation Act applicable is Art. 110 and the arrears of rent became due annually at the end of each fasli and not in 1930 when the appeal was dismissed.

27 Mad. 143 (P.C.), distinguished.

"Shrotriem" is "rent" and the word "rent" in the Limitation Act cannot be interpreted in any restricted way.

C. Rama Rao for Appellant.

G. Chandrasekhara Sastri for Respondents.

K.S.

Wadsworth, J.
16th April, 1941.

Batcha Maistri *v.* Lakshmi Ammal.
C.R.P. No. 2132 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 4 *(h)—Scope—Possession by woman decree-holder of land worth Rs.* 300—*Whether excluded by exceptions in S.* 4 *(h).*

An application under S. 19 of Act IV cannot be dismissed on the ground that the decree-holder (a woman) though owning land did not own 'property' because the land was worth only Rs. 300. S. 4 (*h*) of Act IV of 1938 protects a woman who does not own any property other than debts up to Rs. 3,000 residential house and personal adornments. Land worth Rs. 300 is clearly property not excluded by any of these exceptions.

T. S. Venkataraman for Petitioner.

S. Rangachari for Respondent.

K.S.

N R C

Horwill, J.
18th April, 1941.

Manikyala Rao *v.* Subbarao by guardian.
C.R.P. No. 338 of 1939.

Civil Procedure Code (*V of* 1908), *O.* 30, *r.* 1—*"Carrying on business"*—*Meaning.*

The expression "carrying on business" in O. 30, r. 1 should not be interpreted in too narrow a sense as meaning "the business for which the firm came into existence". To sell property, to collect debts, and to complete contracts is certainly "carrying on business". It is therefore reasonable to hold that a firm is carrying on business after dissolution until the business has been completely wound up. I.L.R. (1937) Nag. 28, referred to.

V. Subramanyam for Petitioner.

N. Vasudeva Rao for Respondent.

K.S.

The Chief Justice and Mockett, J.
24th April, 1941.

Ramanavami Sastrigal *v.* Krishna Menon.
C.M.P. Nos. 3026 to 3030 of 1939.

Practice—Appeal to Federal Court—Admission—Procedure—C. P. Code (*V of* 1908), *O.* 45, *rr.* 7 *and* 8.

When once a certificate has been granted by the Court delivering the judgment or passing the decree or final order that a substantial question of law as to the interpretation of the Government of India Act is involved, no further certificate is required and the person aggrieved is entitled to go to the Federal Court, provided that he complies with so much of r. 7 of O. 45, C. P. Code, as is incumbent on him. All that an appellant is then required to do is to provide funds for printing the record and transmitting it to the Federal Court. Thereafter the appeals will be declared to be admitted and the other requirements of r. 8 ordered.

K. P. Ramakrishna Aiyar for Petitioner.

P. Govinda Menon for Respondent.

K.S.

Chief Justice and Venkataramana Rao, J.
24th April, 1941.

Sha Moolchand Kesarmull *v.* Associated Agencies, Madras.
O.S.A. No. 22 of 1940.

Contract—C.I.F. contract—Printed form with typewritten portion—Conflict—Construction.

If the typewritten and printed portions of a contract can be read together effect must, of course, be given to all the provisions, but if the printed portion cannot be reconciled with the typewritten portion, the typewritten portion must prevail.

K. S. Rajagopalachari and *P. V. Subramanyam* for Appellant.

T. A. Rangachari for Respondent.

K.S.

Mockett, J.
25th April, 1941.

Karichiappa Goundan—Appellant.
Criminal Appeal No. 203 of 1941.

Criminal Trial—Practice—Sessions case—Undefended accused—Desirability of Court appointing counsel amicus curiae *to defend.*

It would be well in sessions cases especially in cases of rape that a member of the bar is appointed by the Court to defend the accused.

G. Gopalaswami—amicus curiae for accused.

Public Prosecutor for the Crown.

K.S.

Lakshmana Rao, J.
29*th April*, 1941.

The Public Prosecutor *v.* Jevan
and others accused.
Cr. App. Nos. 116 to 126 of 1941.

Motor Vehicles Act (*VIII of* 1914), *Ss.* 42 (1) and 123 (1)—*Person driving transport vehicle without permit—Liability to conviction.*

The driving of transport vehicle on the public road without a permit would contravene S. 42 (1) of the Motor Vehicles Act. That the permit is to be obtained by the owner cannot make any difference and whoever drives the vehicle in a public place without a permit authorising the use of the vehicle in that place would be punishable under S. 123 (1) of the Act.

Appellant in Person.

Respondents not represented.

K.S.

[F.B.]
The Chief Justice, Mockett and Krishnaswami Aiyangar, JJ.
30*th April*, 1941.

Muralimohan Reddi *v.* Gangaraju
and others.
Appeal Nos. 76 and 77 of 1938.

Hindu Law—Debts—Pre-partition debts—Acknowledgment by father after partition—If can keep the debts alive against divided sons.

The Chief Justice and Mockett, J. (*Krishnaswami Aiyangar, J.*, dissenting).

An acknowledgment of a pre-partition debt by the father subsequent to the partition keeps the debt alive against the sons [(1933) I.L.R. 56 Mad. 833 =65 M.L.J. 311, approved]; the true basis of the obligation of a son being to pay his father's debt irrespective of his position as manager of a joint family there is no question of an agency involved.

Per *Krishnaswami Aiyangar, J.*, (dissenting): The power to acknowledge a debt is incidental to the father's power to contract the debt and to alienate his son's share. The power comes to an end at partition and with it the power to acknowledge also comes to an end even in case of pre-partition debts.

Ch. Raghava Rao and *V. V. Sastri* for Appellants.

Sir A. Krishnaswami Aiyar and *D. Narasaraju* for Respondent.

K.S.

Venkataramana Rao, J.
30*th April*, 1941.

Kurien *v* Municipal Council,
Hindupur.
S.A. No. 320 of 1938.

Madras District Municipalities Act (*V of* 1920), *S.* 250—*Wrongful refusal to grant a licence to run cinema—Liability of Municipal Council for damages.*

When the appellant applied to the municipal council for a licence to run a touring cinema the councillors at a meeting called on the appellant to furnish a civil engineer's certificate regarding the condition of the tent. The appellant furnished such a certificate on 5th May, 1934. In a suit for damages against the council for wrongful refusal to grant a licence,

Held, that when all the conditions imposed by the Municipal Council were complied with it was the duty of the council to issue the licence and the non-performance of that duty amounted to a misfeasance for which the council was liable for damages. The failure to issue the licence was not a mere non-feasance.

V. Govindarajachari and *A. Bhujanga Rao* for Appellant.

Kasturi Seshagiri Rao for Respondent.

K.S.

The Chief Justice and Gentle, J.
2nd May, 1941.

Subramania Sarma and others
(Petitioners)
Crl. R. C. Nos. 442 and 443 of 1941
(Cr. R. P. Nos. 418 and 419 of 1941).

Legal Practitioner—Advocate an accused—If can appear for his co-accused in the same case—Madras Criminal Rules of Practice, r 82*—Scope.*

An advocate who is an accused in a criminal case cannot appear and act for the co-accused in the same case. R. 82 of the Criminal Rules of Practice does not authorise a co-accused to appear as counsel in the case.

9 H.L.C. 711=11 E.R. 907 and 19 L.J. (C.P.) 374, relied on.

K. Bhashyam Aiyangar for *P. S. Kailasam* and *B. Jagannadha Das* for *S. Suryaprakasam* and *S. Viswanathan* for Petitioners.

The Crown Prosecutor (*P. Govinda Menon*) with *C. D. Venkataraman* for the Crown.

K.S.

Pandrang Row and
Abdur Rahman, JJ.
2nd May, 1941.

Mahadeva Royal *v.* Veerabasava
Chikka Royal.
C.M.P. No. 1933 of 1941.

Civil Procedure Code (*V of* 1908), *Ss.* 109 *and* 110*—"Substantial questions"—What are.*

A decision in regard to the non-admissibility of documents is a substantial question which would entitle the aggrieved party to have a certificate for leave to appeal to the Judicial Committee.

The Advocate-General (*Sir A. Krishnaswami Aiyar*), *B. C. Seshachala Aiyar* and *K. Seshagiri Rao Naidu* for Petitioner.

T. R. Venkatarama Sastriar, N. C. Vijayaraghavacharar and *A. C. Sampath Aiyangar* for Respondents.

K.S.

Wadsworth and Patanjali
Sastri, JJ.
2nd May, 1941.

Seshayya *v.* Venkataramayya.
A.A.O. No. 580 of 1938 converted into C.R.P. No. 684 of 1941.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 23*—Scope—Sale held just one week after Act IV of* 1938 *came into force—Whether governed by S.* 23.

Section 23 only relates to sales held between the 1st October, 1937 and the 22nd March, 1938 and has no application to a sale held one week after the Act came into force.

K. Kotayya for Petitioner.

K. Raguramiah for Respondent.

K.S.

Horwill, J.
2nd May, 1941.

Karsandas & Brothers *v.* South
Indian Railway Co., Ltd.
C.R.P. No. 982 of 1939.

Common carrier—Railway—Carriage of goods—Liability for damages caused by rain water.

If a railway company undertakes to carry perishable goods or to carry goods that will be injured by rain water, as most goods are, it should take precautions to see that rain water does not come into contact with the goods. The railway company will be liable for damages caused by its negligence in not taking such precautions.

N. R. Sesha Aiyar for Petitioner.

S. S. Ramachandra Aiyar for Respondent.

K.S.

[END OF VOLUME 1941—I]